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Supreme Court of the United States

OCTOBER TERM, 1984

LINEAS AEREAS COSTARRICENSES, S.A., *et al.*,
Appellants,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of the State of Florida

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Where foreign aircraft operating exclusively in foreign commerce take on fuel in Florida for use in international air transportation, may the State of Florida subject that fuel to an unapportioned excise tax when that tax prevents the Federal Government from speaking with one voice in regulating commercial relations with foreign governments, flatly contravenes the announced foreign policy of the United States, and creates a substantial risk of international multiple taxation?

2. May foreign airlines operating in foreign commerce be required to bear a fuel tax burden substantially heavier than that which the State imposes on operators of competing modes of transportation?

PARTIES TO THIS PROCEEDING

Lineas Aereas Costarricenses, S.A., and eight other foreign airlines that have intervened as plaintiffs in this matter ("Foreign Airline Appellants") appeal from a judgment of the Supreme Court of Florida that upheld the constitutionality of an unapportioned Florida excise tax on jet fuel purchased exclusively for use in foreign commerce. The complete names of all of the Foreign Airline Appellants, and their parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates, are provided in Appendix I.

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STATE OF FLORIDA, DEPARTMENT OF REVENUE,
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On Appeal from the Supreme Court of the State of Florida

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Florida Supreme Court in this proceeding (Appendix A) is not reported. The opinions in the companion cases (Appendix B) referred to therein are reported as follows: *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So.2d 311 (Fla. 1984); *Delta Air Lines, Inc. v. Department of Revenue*, 455 So.2d 317 (Fla. 1984); *Department of Revenue v. Air Jamaica Ltd., et al.*, 455 So.2d 324 (Fla. 1984); *Department of Revenue v. Wardair Canada, Ltd.*, 455 So.2d 326 (Fla. 1984). The opinion of the Florida Supreme Court in the companion case of *Northeastern International Airways,*

Inc. v. Department of Revenue is not reported. The final judgment of the Second Circuit Court in and for Leon County, Florida (Appendix C) is also not reported.

JURISDICTION

On June 14, 1984, reversing a decision by the trial court, the Florida Supreme Court upheld the constitutionality of those portions of Chapter 212, Florida Statutes, which are the subject of this appeal. The Foreign Airline Appellants filed a Motion for Rehearing on June 27, 1984 (Appendix F), which was denied on September 12, 1984 (Appendix G). A Notice of Appeal was filed in the Florida Supreme Court on September 14, 1984 (Appendix H). The jurisdiction of this court is invoked under 28 U.S.C. § 1257(2) (1982). *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-41 (1979).

CONSTITUTIONAL, STATUTORY, AND INTERNATIONAL AGREEMENT PROVISIONS

Fla. Stat. Ann. § 212.62(1) (West Supp. 1984) imposes a tax on consumers of "special fuels" (including aviation fuel) at a current rate of 5.7¢ per gallon.[1] Fla. Stat. Ann. § 212.08(4) (West Supp. 1984) (Appendix J), as revised effective April 1, 1983, requires that common carriers licensed by the Interstate Commerce Commission and vessels used to transport persons or property in interstate or foreign commerce pay this tax only on fuel they consume within the State of Florida. There is no corresponding provision for airlines.

Various international aviation agreements between the United States and the home countries of most of the Foreign Airline Appellants provide for the reciprocal exemption of airlines of both countries from national

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[1] Technically, the tax is imposed upon the fuel suppliers. However, those companies are required to pass the tax on to the Foreign Airline Appellants. Fla. Stat. Ann. § 212.62(2) (West Supp. 1984).

duties and charges on fuel.[2] Certain of the agreements also require the United States to use its best efforts to obtain exemptions for foreign airlines from state and local taxes on fuel.

The relevant provisions of the Constitution are the Commerce Clause (U.S. Const. art. I, § 8, cl. 3) and the Equal Protection Clause of the 14th Amendment. (U.S. Const. amend. XIV, § 1)

STATEMENT

For many years, the State of Florida has imposed excise taxes on fuel purchased by airlines within that State. Prior to April 1, 1983, the taxes were prorated on a mileage basis; only fuel consumed within the State of Florida was taxed. Discussing a parallel tax exemption, the Florida Supreme Court explained in *Tropical Shipping & Construction Co. Ltd. v. Askew*, 364 So. 2d. 433, 435 (Fla. 1978):

> The purpose of the partial tax exemption is to prevent the State from exceeding its powers to tax interstate and foreign commerce. The proration formula was designed so that Florida would only tax that portion of commerce activity that occurred within the State.

The proration feature was repealed, for airlines only, effective April 1, 1983.

Each of the Foreign Airline Appellants serves only one point in the State of Florida—Miami. Following normal airline routes, the Foreign Airline Appellants' aircraft travel only briefly in Florida air space. International airlines therefore paid little, or no, fuel tax prior to April 1, 1983.

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[2] The full citations of these agreements and their provisions directly relating to fuel taxes are set forth in Appendix K.

Senate Bill 8A, enacted in March of 1983, radically altered Florida's scheme of airline fuel taxation. It established a new excise tax applicable only to motor fuels and special fuels (*i.e.*, most fuels for vehicles and machinery other than gasoline). That tax was set at five percent of an artificial "price" established by legislative fiat at $1.148 per gallon (Fla. Stat. Ann. § 212.62(3)(c) (West Supp. 1984)). (Actual jet fuel prices have consistently been less than $1.00 per gallon in recent years. Appendix E at 57a.)

The mileage proration provision previously applicable to all common carriers, including airlines, was limited by the new law to carriers licensed by the Interstate Commerce Commission (principally railroads) and to vessels in interstate or foreign commerce. Finally, certain large Florida-based airlines were granted an income tax credit equal to part of the special fuels tax that they paid. (Fla. Stat. Ann. § 220.189 (West Supp. 1984)).

All of the Foreign Airline Appellants are airlines established under the laws of foreign countries and designated and licensed by those countries to provide international services to and from the United States. By law, they are forbidden to provide interstate or intrastate air transportation except under highly unusual circumstances. 49 U.S.C. app. § 1508(b) (1982).

The Foreign Airline Appellants all purchase significant quantities of aviation jet fuel at Miami International Airport, and are all therefore subject to the special fuels tax. All of the Foreign Airline Appellants are exempt from federal taxation of aviation fuel because of reciprocal exemptions provided to United States carriers by their home country governments.

Each of the Foreign Airline Appellants has its corporate headquarters in its home country. Each has been

found by the Civil Aeronautics Board to be substantially owned and effectively controlled by the government or nationals of its home country.

Aviation relations between the United States and the home countries of the Foreign Airline Appellants are governed by a number of multilateral aviation agreements.[3] In addition, each of the home countries of the Foreign Airline Appellants, with the exception of Honduras, has entered into a bilateral air transport services agreement with the United States. (Appendix K) Each of these agreements provides for exemptions from national duties and charges on aviation fuel on a basis of reciprocity. The aviation agreement between the United States and Costa Rica also calls upon the United States to exercise its best efforts to obtain exemption from state fuel taxes for Costa Rican carriers. Air Transport Services Agreement between the United States and Costa Rica, art. 9(5), Appendix K at 88a.

The Foreign Airline Appellants brought this action in the Second Circuit Court in and for Leon County, Florida, seeking declaratory and injunctive relief against the application of this tax to them. They first raised the constitutional issues presented herein in their complaints. Briefs on these issues were filed in the Circuit Court, and the issues were argued at hearing. The Circuit Court rejected arguments of the Foreign Airline Appellants based on Equal Protection and Commerce Clause standards. However, it found that the tax was inconsistent with the policies of the bilateral aviation agreements, and with international reciprocity in cases where no agree-

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[3] *See, e.g.: Convention on International Civil Aviation,* Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295; *Convention for the Unification of Certain Rules Relating to International Transportation by Air,* October 12 ,1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11.

ments applied. Accordingly, the Court enjoined collection of this tax from the Foreign Airline Appellants. (Circuit Court Decision, Appendix D)

The Department of Revenue (DOR) appealed that decision to the First District Court of Appeal, which, in turn, certified the question directly to the Florida Supreme Court (Appendix C). The Florida Supreme Court held that the income tax credit for Florida-based airlines was inconsistent with the Commerce and Equal Protection clauses, but severed that credit from the remainder of the statute. It upheld the rest of the fuel tax.[4] The Foreign Airline Appellants filed a Motion for Rehearing, which was denied on September 12, 1984. A Notice of Appeal to this Court was filed on September 14, 1984. The Foreign Airline Appellants are docketing that appeal today.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

I. THE DECISION BELOW IS TOTALLY INCONSISTENT WITH *JAPAN LINE, LTD. v. COUNTY OF LOS ANGELES*, 441 U.S. 434 (1979)

The question presented in *Japan Line* was whether it is constitutional for a State to impose a nondiscriminatory property tax on foreign-owned instrumentalities of international commerce. The question presented here is similar: whether it is constitutional for a State to impose a discriminatory tax on foreign-owned instrumentalities of international commerce. The answer the Court gave to the former question should, we submit, be controlling here.

Japan Line teaches that when a State seeks to tax an instrumentality of foreign commerce:

> . . . a Court must . . . inquire, first, whether the tax, notwithstanding apportionment, creates a sub-

[4] These determinations were made in *Wardair Canada, Ltd.*, 455 So.2d at 329, Appendix B at 31a, and then applied in this proceeding.

> stantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments." If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause.

441 U.S. at 451.

The Florida fuel tax fails both of these tests.

First, it impairs federal uniformity in an area where such uniformity is essential. This test—originally developed in *Japan Line*—was amplified in *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 103 S.Ct. 2933 (1983), where the Court identified two subtests: 1) whether a particular tax implicates foreign policy issues that must be left to the Federal Government, and 2) whether that tax violates a clear federal directive. *Id.* at 2955. The Florida Supreme Court ignored the first subtest and applied the second one incorrectly. *See Wardair Canada, Ltd.*, 455 So.2d at 329, Appendix B at 36a-37a.

The consistent policy of the United States for many years has been that international airlines should be exempt from fuel taxes on the basis of reciprocity. This policy is expressed at the federal level through statutory provisions granting exemptions from otherwise applicable federal excise taxes. *See, e.g.*, 26 U.S.C. §§ 4221(a)(3), (e)(1) (1982). It is also reflected in specific provisions of bilateral executive agreements providing for reciprocal exemptions from tax (Appendix K). It is further recognized in some of the more recent executive agreements regarding international aviation, which commit the United States to use its best efforts to obtain reciprocal exemptions from state taxes for foreign airlines. *See,*

e.g., Air Transport Services Agreement between the United States and Costa Rica, art. 9(5), Appendix K at 88a.

Standing alone, each of these authorities would be strong evidence of the policy of the Federal Government in this area. However, there was even more direct evidence before the Florida courts in the form of an exchange of correspondence between the Federal Government and the Florida Department of Revenue regarding this very fuel tax.

In September of 1982, the Deputy Assistant Secretary of State for Transportation and Telecommunications wrote to the Florida Department of Revenue indicating that a number of foreign governments had recently questioned the appropriateness of imposing state and local taxes on purchases of fuel and other technical supplies by foreign carriers due to the long-standing international practice of reciprocally exempting such items from tax. The letter continued that:

> A few such governments have raised the possibility that State and local authorities in their jurisdictions could impose similar taxes on U.S. airlines. A proliferation of state and local taxes would frustrate the international system of reciprocal tax exemptions and thereby significantly increase the cost of international air transportation.

Letter dated Sept. 29, 1982. Appendix L at 95a.

The DOR responded by reassuring the State Department that Florida tax law recognized the importance of foreign airlines and granted liberal exemptions to them. Letter dated Oct. 25, 1982. Appendix L at 97a-98a.

After learning of the provisions of Senate Bill 8A, the State Department wrote:

> . . . we were surprised and distressed to hear that the State of Florida plans to impose a 5% tax on

> aviation fuel, effective April 1, 1983. I understand the tax is to be applied to all aviation fuel sold and not only to fuel consumed in Florida, as had previously been the case. If imposed, *this tax will cause serious foreign relations problems unless provision is made to exclude foreign airlines.* It may be possible, for example, to provide for an exemption based on reciprocity whereby foreign airlines would be exempted from the tax if U.S. airlines operating to the foreign airline's home country are also exempted from similar taxes.

Letter dated March 17, 1982 [*sic*]. Appendix L at 99a. (Emphasis supplied)

On the day of oral argument before the Florida Supreme Court, the Department of State, speaking on behalf of itself, the Department of Transportation, and the Civil Aeronautics Board, expressed this point in even more forceful terms:

> The United States is committed—by statute, international agreement and express policy—to a marketplace for international aviation governed, to the greatest extent possible, by competitive forces unaltered by governmental intervention. Foreign taxation of air carriers threatens an excessive tax burden on international transportation and restricted access to the marketplace; it may also undermine the evenhandedness requisite to fair competition in the marketplace. Therefore, the federal government has participated in and is continuing to encourage a growing international consensus to promote international air services through reciprocal exemption of air carriers from foreign taxes. As part of this policy, the U.S. encourages the states to exempt foreign air carriers from all taxes, in particular to avoid retaliation by foreign governments against all U.S. carriers in response to the tax policy of only one state. Senate Bill No. 8-A conflicts with this

> federal policy and the long-accepted international practice it reflects.

Telegram dated Aug. 30, 1983. Appendix L at 105a-106a.[5]

The issue could not be more sharply drawn. The United States believes that foreign airlines should be reciprocally exempted from federal, state, and local taxes on aviation fuel. The State of Florida disagrees with this policy, and has imposed a tax on aviation fuel which has the potential to disrupt United States foreign policy by undermining the Federal Government's ability to bargain with our aviation trading partners for reciprocal tax exemptions.

The Florida Supreme Court held that no conflict with federal policy existed because the bilateral agreements provided specific exemptions from national duties and charges only. The Florida Court concluded that Florida was therefore free to tax aviation fuel. *See Wardair Canada, Ltd.*, 455 So.2d at 329, Appendix B at 35a-36a. But here again, the Court below simply ignored *Japan Line.*

There, the United States and Japan were parties to a multilateral convention on containers, Customs Convention on Containers, May 18, 1956, 20 U.S.T. 301, T.I.A.S. No. 6634, 338 U.N.T.S. 103, which established exemptions from customs duties and certain taxes but

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[5] The Foreign Airline Appellants moved to include this telegram in the record of this proceeding. That motion was denied. The refusal of the Florida Court to even consider the views of the United States was totally unwarranted. *See, e.g.*: *Japan Line*, 441 U.S. at 452, n.17; *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 764 (1972); *Occidental of UMM al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1204 (5th Cir. 1978), *cert. denied sub nom. Occidental al Qaywayn, Inc. v. Cities Service Oil Co.*, 442 U.S. 928 (1979); *Bernstein v. N.V. Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954).

did not specifically forbid the California *ad valorem* tax. The *Japan Line* Court drew no negative inferences from the fact that state taxes were not covered by the multilateral convention, *Japan Line*, 441 U.S. at 453-54, and no such inferences should be drawn here.[6]

The Florida Court failed to recognize that the terms of the bilateral agreements do not necessarily reflect the full scope of United States policy for two basic reasons. First, these accords are executive agreements and not treaties. When the first bilateral air transport agreements were adopted, the Congress expressed serious concern that the Executive Branch was exceeding its constitutional authority by entering into them at all.[7] Given this historical context, it is hardly surprising that the Executive Branch found it prudent to keep the scope of these agreements as narrow as possible and to refrain from dealing with state tax issues in the early agreements.

Secondly, when the basic format of the aviation agreement used by the United States was developed in the 1940's, the aviation world was much different than it is today. International airlines typically served only a few international gateway cities. There was little interest by state tax authorities in international aviation as a potential source of state revenue. Most foreign airlines purchased only bonded fuel for international flights, and such fuel was clearly not subject to any state taxes.

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[6] In *Container*, this Court condemned inconsistencies with federal directives. *Container*, 103 S.Ct. at 2955. It did not limit its preemption analysis to treaties or executive agreements.

[7] *See, e.g.*: *Civil Aviation Agreements: Hearings before the Senate Comm. on Commerce on S. 1814*, 79th Cong., 2d Sess. (1946); Senate Comm. on Commerce, Resolution, with an Accompanying Report, Relative to the So-Called Bermuda Agreement, S. Doc. No. 173, 79th Cong., 2d Sess. (1946); 92 Cong. Rec. 1126-30, 3421-28, 4040-52 (1946). *See also* Lissitzyn, *The Legal Status of Executive Agreements on Air Transportation* (pts. 1 & 2), 17 J. Air L. & Com. 436 (1950), 18 J. Air L. & Com. 12 (1951).

McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940). The issue of state fuel taxes simply had not achieved the level of importance that it now has.

The Florida Court also ignored the specific provisions of those bilateral agreements that call on the federal government to use its best efforts to obtain exemptions from state fuel taxes. *See, e.g.*, Air Transport Services Agreement between the United States and Costa Rica, art. 9(5), Appendix K at 88a. Contrary to the analysis of the Florida Court, many of the most recent agreements are not silent on the issue of state taxes. Instead, they clearly evidence federal support for reciprocal exemption.

As *Container* pointed out, there are two aspects of the federal uniformity test. The first factor discussed in *Container*—the fact that certain taxes implicate foreign policy issues that must be left exclusively to the Federal Government even where no specific federal action has previously been taken, *Container*, 103 S.Ct. at 2955—was not even considered by the Florida Supreme Court.

The Florida tax clearly invades an area that must be reserved to the federal government. This is perhaps most easily demonstrated by reference to the likelihood of retaliation against United States carriers if taxes such as the Florida tax are allowed to stand. Foreign governments have every reason to be concerned when their flag carriers face taxes of a type not imposed on United States airlines doing business abroad. Those countries with federal systems would have good reason for concluding that they are justified in permitting imposition of taxes at the local level. Those nations without federal systems may well conclude that the degree of reciprocity afforded by the United States is inadequate or illusory. In either case, the prospect of retaliatory taxation that would undermine the international consensus that the United States has worked for years to develop is both real and serious. This is precisely the type of foreign policy

complication that the uniformity test was designed to avoid.

A further problem arises from the fact that many foreign airlines serve more than one State in the United States. There is every reason to believe that unless this Court invalidates the Florida fuel tax, other jurisdictions will impose such levies.[8] The likely result is the imposition of a number of taxes at differing rates and on differing bases by various United States jurisdictions. The confusion that would result was precisely what this Court had in mind when it observed in *Japan Line* that:

> If other States followed the taxing State's example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation, a result that would plainly prevent this Nation from "speaking with one voice" in regulating foreign commerce.

441 U.S. at 450-51.

The Florida fuel tax also creates an unacceptable risk of multiple taxation of United States carriers. Within the United States, sales taxes and use taxes are generally viewed as reciprocals; use taxes do not normally apply to items that are subject to sales tax in other jurisdictions, or credit is given for taxes paid to other jurisdictions. Internationally, duplication between sales taxes and use taxes cannot be avoided in this manner. The United States cannot prevent foreign governments from imposing use taxes on a substantial portion of the fuel purchased and taxed in Florida. Neither can the United States require foreign governments to allow credit for taxes paid to the State of Florida. The danger of overlapping multiple taxation is clear. Even if the amount of this overlap

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[8] Indeed, Illinois State authorities moved to broaden the scope of that State's excise taxes on fuel in partial reliance on the Florida Supreme Court decision.

should prove to be small, *Japan Line* makes it clear that this would be a matter for serious concern:

> Even a slight overlapping of tax—a problem that might be considered *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned.

441 U.S. at 456 (footnote deleted).

The Florida Supreme Court cavalierly dismissed the issue of multiple taxation. *See Wardair Canada, Ltd.*, 455 So.2d at 329, Appendix B at 35a. It is true that foreign governments have not yet imposed new taxes in response to the Florida levy; but this is hardly surprising. The Florida tax is a radical departure from past practice in the United States and has only been in effect for slightly more than eighteen months. Its validity under U.S. law has been under litigation since its inception. The Florida Court had no reason to infer that multiple taxation will not occur if it becomes clear that the United States will permit Florida to tax the Foreign Airline Appellants' fuel.

In summary, Florida's unapportioned fuel tax undermines federal uniformity in an area of taxation where such uniformity is essential. It prevents the United States from speaking with one voice in its international aviation relations and raises the possibility of multiple international taxation of fuel as well as the establishment of retaliatory taxes by our trading partners. For these reasons, it is directly contrary to the Commerce Clause tests established by *Japan Line* and *Container*.[9]

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[9] We also submit that this case is not governed by the prior decisions of this Court concerning aviation fuel taxes. Those decisions (*Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U.S. 147 (1932); *Edelman v. Boeing Air Transport, Inc.*, 289 U.S. 249 (1933) and *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973)) held that excise taxes on aviation fuel passed constitu-

II. BY DISCRIMINATING AGAINST FOREIGN AIR COMMERCE, FLORIDA HAS DENIED THE FOREIGN AIRLINE APPELLANTS EQUAL PROTECTION OF THE LAWS

The State of Florida has discriminated improperly among different modes of transportation. In effect, Section 212.08(4) of the statute requires airlines to pay fuel tax on all of the fuel they purchase in Florida, without regard to whether the fuel is consumed in that State (or even in the United States), while ocean-going vessels—which compete directly with many of the Foreign Airline Appellants—and railroads regulated by the Interstate Commerce Commission are subject to tax only on

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tional muster because the taxable events on which those excises focused all were intrastate occurrences. Accordingly, the Court held, on the basis of *Nashville, Chattanooga & St. Louis Railway Co. v. Wallace*, 288 U.S. 249 (1933) that these taxes did not directly burden interstate commerce. In so doing, the Court distinguished the case of *Helson & Randolph v. Kentucky*, 279 U.S. 245 (1929), in which it had invalidated a Kentucky use tax on fuel purchased in another state and consumed by common carrier barges passing through Kentucky, on the grounds that this latter tax clearly involved taxation of the privilege of engaging in interstate commerce.

The direct burden analysis of these cases was repudiated in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). In evaluating whether a state tax raises questions under the Commerce Clause, this Court now examines the practical effects of the tax on interstate commerce. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). There can be no doubt that this substantial excise tax on one of the necessities of international aviation has a significant practical effect on interstate and foreign commerce.

Secondly, it should be noted that all of these cases were decided before *Japan Line*, and none of them considered the possible application of stricter standards where foreign commerce is involved. In *Eastern* and *Edelman*, it appears that foreign commerce was not at issue. In *Mahin*, only the dissenting opinion of Douglas, J. referred to foreign commerce at all. Even that discussion was framed solely in terms of the direct/indirect burden analysis that was then prevalent. *Mahin*, 410 U.S. at 632-39 (Douglas, J., dissenting).

fuel actually consumed in Florida, as determined by a mileage formula. This discriminatory approach raises serious questions under the Equal Protection Clause.

For a number of years, the courts have recognized that common carriers should be considered together as a class for equal protection purposes and receive parallel treatment. *See, e.g.: Atchison, Topeka & Santa Fe Railway Co. v. Vosburg*, 238 U.S. 56 (1915); *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*, 165 U.S. 150 (1897). Similarly, this Court has on several occasions approved taxation schemes involving air transportation while specifically noting that those schemes treat airlines in a manner similar to other forms of transportation. *See, e.g.: Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954); and *Eastern Air Transport, Inc. v. South Carolina Tax Commission, supra.* The law is well established that where organizations are "similarly circumstanced"—as airlines and competing surface carriers are—they are entitled to parallel treatment under the Equal Protection Clause. The Florida fuel tax fails to give equal treatment and thus offends Equal Protection precepts.

The Florida Supreme Court's only response to this issue was that there are "many obvious distinctions" between airlines and other modes of transportation and that they are "inherently and essentially different." [10] There is no indication, however, that the differences between airlines and shipping companies have any relationship to the differing tax burdens to which they are now subjected. In fact, international airlines and shipping companies perform exactly the same tasks—transporting persons, property and mail to and from foreign destinations. Indeed, they often serve the same markets. The uncontested record below demonstrates that many of the

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[10] *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So.2d 311, 314 (Fla. 1984), Appendix B at 12a.

Foreign Airline Appellants compete directly with ocean-going vessels. The burdens they impose and the services they demand from the State of Florida are also similar. Both modes of transportation require the same type of facilities in Florida—terminals, maintenance facilities, sales and managerial offices. Neither type of international carrier actually travels within Florida for any substantial distance. Both types of carriers receive the same general benefits from roads and other public facilities provided by the State of Florida. Collection of a prorated tax from international shipping companies is certainly no less burdensome from an administrative standpoint and results in no larger diminution in revenues than collection of such a tax from airlines.

In short, international airlines and international shipping lines are similarly circumstanced for Equal Protection purposes and must receive substantially equal treatment. There is no rational basis for discriminating between these two competing modes of transportation. Yet this is precisely what the Florida tax has done. Accordingly, the Florida tax offends fundamental concepts of Equal Protection of the Laws.

CONCLUSION

The precepts that federal uniformity is paramount when matters of foreign commerce are involved and that persons similarly situated should be equally treated are fundamental principles consistently sustained by this Court. The Florida fuel tax flagrantly violates both of these principles. There are few areas that demand federal uniformity more than international air transportation. If unilateral state intrusion into the field of international air transportation is not resisted, the inevitable result will be a profusion of state taxes on instrumentalities of international aviation that will be certain to produce retaliation by foreign governments and to increase tax burdens on United States air carriers that provide

international service. A state law that shatters the uniformity that is essential to the conduct of international air transportation will make it substantially more difficult for the Federal Government to reach agreements with its international aviation partners, and will erode the basis for reciprocal exemption from taxation that has been a cornerstone of the international air transport system for nearly forty years. These are precisely the pernicious consequences of the Florida fuel tax. The frustration of federal uniformity and the conflict with national policy that flow from the application of this tax to foreign air carriers cannot and should not be permitted.

This Court should note probable jurisdiction.

Respectfully submitted,

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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LINEAS AEREAS COSTARRICENSES, S.A., *et al.*,
Appellants,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of the State of Florida

APPENDICES TO JURISDICTIONAL STATEMENT

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APPENDIX A

SUPREME COURT OF FLORIDA

DEPARTMENT OF REVENUE,
Appellant/Cross Appellee

v.

LINEAS AEREAS COSTARRICENSES, *et al.*,
Appellees/Cross Appellants

No. 63,989 (Fla. June 14, 1984), *rehearing denied*, Sept. 12, 1984

ADKINS, J.

We have before us an appeal here by an order from the First District Court of Appeal certifying the issue in the case to be of great public importance. We have jurisdiction pursuant to article V, section 3(b)(5), Florida Constitution.

This case arose when Lineas Aereas Costarricenses (hereinafter LACSA) filed a complaint in circuit court in Leon County seeking to enjoin Florida's Department of Revenue from collecting sales taxes, under a provision of chapter 83-3, Laws of Florida, on aviation fuel purchased by LACSA for use in foreign commerce. Transportes Aereos Nacionales, S.A., Aerolineas Argentinas, Aeronaves de Mexico, S.A., Aerovias Nacionales de Columbia, [sic] S.A., Trinidad and Tobago (BWIA International) Airways Corp., Empresa Ecuatoriana de Aviacion, S.A., Linea Aerea Nacional Chile, Compania Mexi-

cana de Aviacion, S.A. de C.V., Viacao Aerea Rio-Grandense, and Venzolana Internacional de Aviacion, S.A. were granted leave to intervene as party plaintiffs.

The circuit court entered an order of final judgment upholding the tax as constitutional but granting the injunction on the basis that the foreign airlines were exempt under certain international agreements. The Department of Revenue is appealing the exemption and LACSA is cross-appealing the determination that the tax is constitutional.

Inasmuch as the issues raised here have been addressed by us in *Delta Air Lines, Inc. v. Department of Revenue*, No. 63,915 (Fla. June 14, 1984); *Department of Revenue v. Wardair Canada Ltd.*, No. 64,036 (Fla. June 14, 1984); and *Department of Revenue v. Air Jamaica Ltd.*, No. 64,035 (Fla. June 14, 1984), they will not be re-addressed.

Accordingly, we affirm the circuit court's order to the extent that it upheld the tax as constitutional with the exception of the portion regarding the corporate tax credit to Florida-based airlines. In *Delta* we determined that portion to be unconstitutional and ordered it stricken from chapter 83-3. We reverse the circuit court's order to the extent that it recognized an exemption from the excise tax for the foreign airlines.

It is so ordered.

ALDERMAN, C.J., BOYD and SHAW, JJ., Concur.

OVERTON, J., Dissents: "I dissent. *See Department of Revenue v. Wardair Canada Ltd.*, No. 64,036 (Fla. June 14, 1984)."

McDONALD, J., Dissents.

APPENDIX B

SUPREME COURT OF FLORIDA

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., *et al.*,
Appellants

v.

DEPARTMENT OF REVENUE,
Appellee

No. 64,085 (Fla. June 14, 1984), *rehearing denied*, Sept. 12, 1984

ADKINS, J.

We have before us an appeal which results from an order by the Fourth District Court of Appeals certifying the issues involved to be of great public importance. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

The case arose with the filing of a complaint in circuit court in Broward County. Northeastern International Airways, Inc., and Arrow Air, Inc., challenged the constitutionality of chapter 83-3, Laws of Florida. The circuit court entered an order of final judgment upholding the constitutionality of chapter 83-3. The plaintiffs challenged the constitutionality of chapter 83-3 but did not argue for exemption on the basis of international agreements entered into by the United States. The circuit court granted a motion for summary judgment against the plaintiffs thereby upholding the constitutionality of the law.

We have dealt with the issues raised here in our decisions in *Eastern Air Lines, Inc. v. Department of Reve-*

nue, No. 63,949 (Fla. June 14, 1984); *Delta Air Lines, Inc. v. Department of Revenue*, No. 63,915 (Fla. June 14, 1984); *Department of Revenue v. Wardair Canada Ltd.*, No. 64,036 (Fla. June 14, 1984); and *Department of Revenue v. Air Jamaica Ltd.*, No. 64,035 (Fla. June 14, 1984).

Accordingly we affirm in part and reverse in part the order of the circuit court. We determined in *Delta* that the portion of chapter 83-3 which provided a tax credit to Florida-based airlines was unconstitutional. We also determined that it was severable and that it was stricken from the law. The remainder of the order is affirmed.

It is so ordered.

ALDERMAN, C.J., BOYD, OVERTON and SHAW, JJ., Concur.

McDONALD, J., Dissents.

SUPREME COURT OF FLORIDA

DEPARTMENT OF REVENUE,
Appellant

v.

AIR JAMAICA LTD., *et al.*,
Appellees

Reported at:
455 So.2d 324 (Fla. June 14, 1984), *rehearing denied*, Sept. 12, 1984

ADKINS, Justice.

This case is before us on an order from the First District Court of Appeal which certified the issues in this case to be of great public importance. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

This case arose with the filing of a complaint in circuit court in Leon County by the respondent Air Jamaica challenging the constitutionality of chapter 83-3, Laws of Florida. By order of the trial court the complaint was amended to include eleven other foreign airlines. The action was consolidated with a case filed by Wardair Canada for the purpose of trial. The parties stipulated to a briefing schedule and an early hearing date was obtained. A procedure was allowed which allowed the airlines to self-accrue the sales tax imposed under chapter 83-3 during the pendency of the proceedings subject to certain conditions.

The circuit court entered an order of final judgment on July 19, 1983, upholding the constitutionality of chapter 83-3 but ruling in favor of the airlines' assertion that

they should be exempt from the tax by virtue of certain executive agreements between their countries and the United States. The trial judge had previously upheld the law in *Delta Air Lines, Inc. v. Department of Revenue*, No. 83-761 (Leon County Cir.Ct.—Civ.Div. May 23, 1983).

The Department of Revenue appealed the circuit court's holding recognizing an exemption for the foreign airlines. The airlines cross-appealed. We will discuss only those issues raised which have not been previously determined by this Court in either *Eastern Air Lines Inc. v. Department of Revenue*, 455 So.2d 311 (Fla. 1984); *Delta Air Lines, Inc. v. Department of Revenue*, 455 So.2d 317 (Fla. 1984); or *Department of Revenue v. Wardair Canada, Ltd.*, 455 So.2d 326 (Fla. 1984).

The airlines challenge the law on the basis it unconstitutionally invades the exclusive powers of the executive and legislative branches to regulate foreign commerce by taxing commerce through a prohibited impost on exports. The airlines did not raise this issue in their pleadings or at oral argument in the circuit court. The department argues that the airlines are therefore precluded from raising the issue now. We agree. Nonetheless, we find that the law is not prohibited by the export-import clause of the federal constitution. The airlines attempt to apply federal statutes which are inapplicable to the excise tax in question. There is no basis for the airlines' conclusion that the tax violates the export-import clause. The airlines attempt unsuccessfully to distinguish the case of *Shell Oil Company v. State Board of Equalization*, 64 Cal.2d 713, 414 P.2d 820, 51 Cal. Rptr. 524 (1966); *appeal dismissed*, 386 U.S. 211, 87 S.Ct. 973, 17 L.Ed.2d 870 (1967). *Shell* indicates, without question, that the fuel at issue here is not an export because it is used to propel that aircraft and is not delivered to another country. Furthermore, the tax in question is imposed on the privilege of the Florida vendor selling motor fuel or spe-

cial fuel with the legal incident being on the first use or withdrawal from storage for use in the State of Florida. Florida is not attempting to tax the *instrument*, that is, the aircraft, of the foreign national while in Florida nor is it attempting to tax the process of exportation nor any fuel *for export*.

The airlines can also find no support for their position in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80 (1946). That case involved the shipment of oil from this country "with the intention of uniting them to the mass of those belonging to some foreign country." *Id.* 414 P.2d at 824, 51 Cal. Rtpr. at 528. The oil was specifically sold for shipment abroad. At the time the tax was levied, the oil had clearly entered the process of exportation. This is not true of the present tax. The fuel is intended to be *used* by the airlines. It is not being purchased by the airline with the intent to transport it for sale abroad. We find no merit to the airlines' argument on this point.

The airlines have raised the argument that the tax is a direct violation of agreements between the United States and their respective countries. We faced a similar challenge to the law in our decision in *Department of Revenue v. Wardair Canada, Ltd.*, 455 So.2d 326 (Fla. 1984). In the present case the airlines have not produced any facts which would enable us to hold contrary to our holding in *Wardair* where we found that the tax did not violate any international agreement. In addition, we find that none of the agreements expressly grant a most favored nation status when dealing with the issue of fuel and taxes as the airlines contend.

Accordingly, we affirm the order of the circuit court as to the constitutionality of chapter 83-3 except that portion of the law pertaining to a tax credit for Florida corporations. In *Delta* we determined that portion to be unconstitutional and it was stricken from the law. We reverse

the circuit court to the extent that it recognized an exemption for foreign airlines.

It is so ordered.

ALDERMAN, C.J., and BOYD and SHAW, JJ., concur.

OVERTON, J., dissenting:

I dissent. *See Department of Revenue v. Wardair Canada Ltd.* [455 So.2d 326], (Fla. 1984).

McDONALD, J., dissents.

SUPREME COURT OF FLORIDA

EASTERN AIR LINES, INC.,
Appellant

v.

DEPARTMENT OF REVENUE,
Appellee

Reported at:

455 So.2d 311 (Fla. June 14, 1984), *rehearing denied*, Sept. 12, 1984

ADKINS, Justice.

The case is before us on an order from the First District Court of Appeal certifying the issues in the case to be of great public importance. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

This case arose with the filing of a complaint by Eastern Air Lines in the circuit court of Leon county seeking declaratory and injunctive relief from the enforcement of provisions of chapter 83-3, Laws of Florida, on the grounds that the law was unconstitutional. Specifically, Eastern alleged that the law violated the equal protection and due process clauses of the Florida and United States Constitutions, was an unconstitutional delegation of legislative authority, and violated the commerce clause of the United States Constitution. By stipulation, the parties agreed to a procedure whereby Eastern was allowed to self-accrue the sales tax imposed under chapter 83-3, which became effective on April 1, 1983, during the pend-

ency of the proceedings subject to certain conditions. The trial judge entered his final judgment in this case on May 27, 1983, incorporating the order he had entered in a similar action filed by Delta Airlines and upholding the constitutionality of chapter 83-3. On June 24, 1983, Eastern filed its notice of appeal with the First District Court of Appeal. On July 12, 1983, that court issued its order certifying the case for immediate resolution by this Court.

Chapter 83-3 was enacted during a special session of the Florida legislature which was called for the express purpose of addressing road transportation and public transit needs in the state. The law revises the tax structure of chapters 212 and 220 of the Florida Statutes. The new law eliminates one-half (4 cents) of the excise tax imposed by former chapter 206, Florida Statutes (1981), on fuel purchased for road transportation use and imposes a five percent sales tax on this fuel through the new Part II of former chapter 212, chapter 83-3, section 6. That section bases the five percent sales tax on a predetermined price for fuel of $1.148 per gallon. The new sales tax is imposed on all aviation jet fuel purchased by interstate air common carriers, but is not imposed on railroads and vessels due to the proration provision which applies to railroads and vessels allowing taxation based on cost and only on the carrier's intrastate mileage. Ch. 83-3, § 5 (amends § 212.08(4), Fla.Stat. (Supp. 1982)). Section 5 of the law provides:

> (4) EXEMPTIONS, ITEMS BEARING OTHER EXCISE TAXES, ETC.—Also exempt are water (not exempting mineral water or carbonated water), and; all fuels used by a public or private utility, including any municipal corporation or rural electric cooperative association, in the generation of electric power or energy for sale. Fuel other than motor fuel and special fuel is taxable as provided in this part, except that fuel expressly exempt herein. Motor fuels and special fuels are taxable as provided in part II,

except that those used by vehicles, other than aircraft, which are licensed as common carriers by the Interstate Commerce Commission to transport persons or property in interstate or foreign commerce and vessels used to transport persons or property in interstate or foreign commerce are taxable only to the extent provided herein.

The first issue which we will address is Eastern's contention that the proration provisions, which do not apply to airlines, violate concepts of equal protection by not treating all common carriers alike. Eastern asserts that all interstate carriers, whether they be airlines, railroads, trucks or vessels, are similarly situated for fuel tax purposes. The circuit court found that Eastern did not sustain its burden of demonstrating that the classification is hostile and oppressive and held that there "is no invidious discrimination by the creation of an arbitrary classification." The court's order states: "Classifying airlines differently from vessels and railroads for fuel tax purposes is not arbitrary. Airlines enjoy advantages and must tolerate some disadvantages due to their distinctive nature." The court cited the example of the airlines being exempt from ad valorem taxes on the lease of property from the county or other governmental unit pursuant to chapter 80-368, Laws of Florida, while vessels and railroads are not. The court also noted that proration of mileage for aircraft has proven difficult in the past because of flight patterns over the Gulf of Mexico and the Atlantic Ocean to avoid the accumulation of intrastate mileage.

When the state legislature, acting within the scope of its authority, undertakes to exert the taxing power, every presumption in favor of the validity of its action is indulged. Only clear and demonstrated usurpation of power will authorize judicial interference with legislative action. *Walters v. City of St. Louis*, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1954). In the field of taxation particu-

larly, the legislature possesses great freedom in classification. The burden is on the one attacking the legislative enactment to negate every conceivable basis which might support it. *Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940); *Just Valuation & Taxation League, Inc. v. Simpson*, 209 So.2d 229, 323 (Fla. 1968). The state must, of course, proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. *Department of Revenue v. AMREP Corp.*, 358 So.2d 1343, 1349 (Fla. 1978). A statute that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. *Allied Stores v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 321 (1959).

We agree with the circuit court's conclusion that Eastern has not met its burden in attacking the classification made here. They have failed to demonstrate that a hostile and oppressive discrimination has been made. There are many obvious distinctions between public road and highway transportation of persons and property and air transportation upon which the classification at issue could rationally be based. The modes of transportation are inherently and essentially different. The classification drawn does not violate concepts of equal protection.

Eastern also argues that the statute, by adopting an initially established fuel price of $1.148 per gallon upon which to base the tax rate, violates concepts of equal protection and unconstitutionally restricts the rights of individuals to contract. The provision being challenged reads as follows:

> § 212.70 Tax imposed on sale of motor fuel and special fuel; tax upon ultimate consumer; determination by department; notification.—
>
> (3) Prior to June 1 of each year, the department shall determine the appropriate sales tax applicable to the retail price per gallon of motor fuel and special fuel as follows:

(a) The department shall determine the appropriate total motor fuel and special fuel retail price, including any federal, state and local excise taxes on such fuel, for the forthcoming 12-month period beginning June 1, by adjusting the initially established price by the percentage change in the average monthly gasoline price component of the Consumer Price Index, issued by the United States Department of Labor, for the most recent 12-month period ending March 31, compared to said average for the 12-month period ending March 31, 1984. However, the adjustment provided herein shall first be made for the forthcoming 12-month period beginning June 1, 1985.

(b) The tax per gallon shall be computed as 5 percent of said total retail price, rounded to the nearest one-tenth of one cent.

(c) The initially established price is $1.148 per gallon.

Eastern asserts that the price set is not related to the actual price of aviation fuel and, therefore, is arbitrary and unreasonable. We do not agree. The tax is levied on first withdrawal of the fuel from the storage tanks and is imposed on all consumers equally regardless of the nature of transport. We find no merit in Eastern's argument that the predetermined price structure invidiously discriminates against airlines.

Eastern also contends that section 6 of the law constitutes an improper delegation of legislative power by relating the price adjustment for future periods to the percentage change in the average monthly gasoline price component of the Consumer Price Index issued by the United States Department of Labor. The Consumer Price Index referred to in the law is authorized by 29 U.S.C. §§ 2, 2a and 2b (1976). Under these code provisions, the Secretary of Labor has broad powers to collect, collate and re-

port statistics, and, to that end, has the power to use bureaus provided for the department and is authorized to call upon other departments of the federal government for data and the results obtained by them. More importantly, the Secretary of Labor may "collate, arrange, and publish such statistical information so obtained in the same manner as to him may seem wise." 29 U.S.C. § 2. The Consumer Price Index is widely used by the federal government to determine such things as cost of living increases in social security, retirement benefits for the military, and other appropriations such as child care payments.

The circuit court in its final judgment determined that the method of appropriation in chapter 83-3 is equivalent to the method which allowed the Department of Education to appropriate state funds to a state agency based on the Florida Price Level Index and which was found to be constitutional in *Gindl v. Department of Education*, 396 So.2d 1105 (Fla. 1979). Eastern argues that the instant case should be distinguished from *Gindl* because here the Department of Revenue is delegated to determine the price upon which the tax will be based by using a federal agency's index to be adopted in the future and over which no Florida agency has any control. Eastern argues that since the department, in arriving at the tax applicable to the price, must, of necessity, rely on an administrative act of the United States Department of Labor which will first take place on March 1, 1984, the legislature has shifted its constitutional duties to that federal agency contrary to the established rule of this state, citing as authority this Court's decision in *State v. Welch*, 279 So.2d 11 (Fla. 1973).

In *State v. Welch*, this Court considered the constitutionality of a portion of the former Florida Drug Abuse Law, chapter 404, Florida Statutes (Supp. 1972), which purported to prohibit certain acts by reference. Specifically, the law declared that it was the intent of the legislature to include under that chapter "all drugs controlled

by the drug abuse laws of the United States, now or in the future," in addition to those specified under Florida law. § 404.515, Fla.Stat. (Supp. 1972). In *Welch* this Court looked to the rule of law announced in *Freimuth v. State*, 272 So.2d 473 (Fla. 1972). There, the Court said that the legislature may adopt provisions of federal statutes and administrative rules made by a federal administrative body that are in existence and in effect at the time the legislature acts, but it would be an unconstitutional delegation of legislative power for the legislature to adopt in advance any federal act or the ruling of any federal administrative body that Congress or an administrative body might see fit to adopt in the future. 272 So.2d at 476. Accordingly, this Court held the statute unconstitutional for attempting to incorporate by reference future legislative and/or administrative actions of jurisdictions outside Florida. *Id.*

We believe that Eastern's reliance on the aforementioned language is misplaced. The statute under attack merely provides that an adjustment be made to the fuel price which is based on the percentage change in the average monthly gasoline price component of the Consumer Price Index. Here, the legislature is merely setting forth the manner in which the department is to determine the appropriate total motor fuel and special fuel retail price. The department is directed with precision how to make such a determination. We think the language of *Welch* and *Freimuth* should be interpreted to apply to statutes which incorporate federal statutes or administrative rules which substantively change the law, and not to a statute which incorporates a federal index to provide aid in making a ministerial determination.

Furthermore, we do not agree with Eastern's contention that the statute is also constitutionally infirm because the Department of Revenue will utilize a consumer price index which is to be determined *after* the effective date of the act. In *Gindl* we upheld a statutory provision

which required a computation based on the most recent publication of the Florida Price Level Index prepared by the Department of Administration. The statute was to take effect July 1, 1976. The Department of Education intended to base the distribution on a survey which would be started in October or November of 1976 and completed during the early part of 1977. In other words, the effect of the statute was to reach forward and allow distribution to be calculated on the most recent publication of the Florida Price Level Index, an index which was not in existence when the law became effective. We agree with the circuit court's determination that the method of appropriation in chapter 83-3 is equivalent to the method approved in *Gindl.*

The final issue which Eastern has raised is whether chapter 83-3 unconstitutionally discriminates against interstate commerce since its tax credit provisions provide a direct commercial advantage to local agriculture and commercial fishing to the detriment of similar interstate activities. The relevant section of the law provides:

> § 212.92 Refunds.—
>
> (e) Refund to farmers and fishermen.—
>
> 1. [A]gricultural purposes means motor fuel or special fuel used in any tractor, vehicle, or other farm equipment which is used exclusively on a farm or for processing farm products on the farm and no part of which is used in any vehicle or equipment driven or operated upon the public highways of this state. This restriction shall not apply to the movement of farm vehicles or farm equipment between farms.
>
> 2. For the purposes of this paragraph, "commercial fishing purposes" shall be construed to mean motor fuel or special fuel used in the operation of boats, vessels, and equipment used exclusively for the taking of fish, crayfish, oysters, shrimp, and sponges from the salt and fresh waters under the jurisdiction

of the state for resale to the public but shall in no way be construed to include fuel used for sports or pleasure fishing, no part of which is used in any vehicle or equipment driven or operated upon the highways of this state.

3. Any person who uses any motor fuel or special fuel for agricultural purposes or commercial fishing purposes on which the tax imposed by this part has been paid shall be entitled to a refund of said tax.

The Department of Revenue questions Eastern's standing to challenge chapter 83-3's full refund provisions, section 212.92(1)(e), 2. & 3., since Eastern is "neither in the *fishing* or *farming business* and . . . Eastern does not contend that farmers and/or fishermen are in direct or indirect competition with their airline enterprise." Eastern does not compete with fishing or agriculture. We agree that Eastern does not have standing to raise the unconstitutionality of these full refund provisions. In *State ex rel. Clarkson v. Philips*, 70 Fla. 340, 70 So. 367 (1915), this Court held that the constitutionality of a provision of a statute cannot be tested by a party whose rights or duties are not affected by it, unless the provision is of such a nature that it renders invalid a provision of the statute that does affect the party's rights or duties.

It is a fundamental principle that a statute, if constitutional in one part and unconstitutional in another part, may remain valid except for the unconstitutional portion. However, this is dependent upon the unconstitutional provision being severable from the remainder of the statute. The severability of a statutory provision is determined by its relation to the overall legislative intent of the statute of which it is a part, and whether the statute, less the invalid provisions, can still accomplish this intent. *Cramp v. Board of Public Instruction*, 137 So.2d 828 (Fla. 1962).

Additionally, if the valid portion of the law would be rendered incomplete, or if severance would cause results unanticipated by the legislature, there can be no severance of the invalid parts; the entire law must be declared unconstitutional. *Kass v. Lewin*, 104 So.2d 572 (Fla. 1958). This Court succinctly summarized the general rules regarding severability in *Presbyterian Homes of Synod v. Wood*, 297 So.2d 556 (Fla. 1974), wherein the Court stated:

> An unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining valid provisions, that is, if the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void; and the good and bad features are not inseparable and the Legislature would have passed one without the other; and an act complete in itself remains after the invalid provisions are stricken.

Id. at 559.

We believe that the legislature's intent could still be accomplished if the full refund provisions relating to local commercial fishing and agriculture were to be eliminated and the remainder of the statute left intact. Therefore, we cannot say that these provisions, were we to declare them unconstitutional, are of such a nature that they would render invalid the portion of the statute that does affect Eastern's rights. Eastern has no standing to raise this issue.

Accordingly, we affirm the order of the circuit court.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON, McDONALD and SHAW, JJ., concur.

SUPREME COURT OF FLORIDA

DELTA AIR LINES, INC., *et al.*,
Appellants

v.

DEPARTMENT OF REVENUE,
Appellee

Reported at:

455 So.2d 317 (Fla. June 14, 1984), *rehearing denied*, Sept. 12, 1984

ADKINS, Justice.

This case is before us on an order from the First District Court of Appeal certifying the issue in the case to be of great public importance. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

This case arose with the filing of a complaint by Delta Air Lines in the circuit court of Leon County seeking declaratory and injunctive relief from the enforcement of provisions of chapter 83-3, Laws of Florida, on the ground that the law was unconstitutional. Capitol Air, Inc., Northwest Airlines, Inc., Ozark Air Lines, Inc., Piedmont Aviation, Inc., Republic Airlines, Inc., The Flying Tiger Lines, Inc., United Airlines and USAir, Inc., were granted leave to intervene as party plaintiffs. On May 27, 1983, the circuit court entered its final judgment in favor of the Department of Revenue ruling the law constitutional. Delta appealed to the First District Court of Appeal which certified the case for immediate resolution by this Court.

We described the structure of chapter 83-3 and resolved some of the issues raised by Delta in our decision in *Eastern Air Lines v. Department of Revenue*, 455 So.2d 311 (Fla. 1984). There are two issues which Delta raises which we were not faced with in that decision.

First, Delta raises the issue of whether chapter 83-3 violates the commerce clause of the United States Constitution by providing a corporate income tax credit for Florida-based airlines. Chapter 220, Florida Statutes (1981), imposes an income tax on domestic corporations and foreign corporations qualified to do business in Florida or actually doing business in Florida. Section 61 of chapter 83-3 creates section 220.189, Florida Statutes (1983), and provides a credit against the corporate income tax for air common carriers who have a corporate or business home office in Florida and also maintain a work force of more than 1200 employees in the state. This credit offsets up to one-half of the air carriers' fuel tax liabilities with a maximum credit of $5 million.

A state tax is not *per se* invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its own way. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823 (1938). Taxes have been sustained against commerce clause challenges when the tax: 1) is applied to an activity with a substantial nexus with the taxing state; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the state. *Complete Auto*, 430 U.S. at 279, 97 S.Ct. at 1079. No state may, consistent with the commerce clause, "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329, 97 S.Ct. 599, 607, 50 L.Ed.2d 514 (1977); *Northwestern States Port-*

land Cement Co. v. Minnesota, 358 U.S. 450, 457, 79 S.Ct. 357, 361, 3 L.Ed.2d 421 (1959). This principle follows from the basic purpose of the commerce clause which is to prohibit preferential trade areas destructive of the free commerce anticipated by the United States Constitution. *Boston Stock Exchange*, 429 U.S. at 329, 97 S.Ct. at 606; *Dean Milk Co. v. Madison*, 340 U.S. 349, 356, 71 S.Ct. 295, 298, 95 L.Ed. 329 (1951).

In *Boston Stock Exchange* the United States Supreme Court found unconstitutional a state stock transfer tax containing credit provisions which had the effect of discriminating against interstate commerce to the direct commercial advantage of local business. The transfer tax was imposed if any one of five events (sale, transfer, delivery, etc.) occurred within the state. The rate of tax was based upon the price of the security. The total tax was determined by the number of shares involved in the taxable event. The imposition of the tax itself was found to be constitutional. However, the credit structure of the tax was found to be unconstitutional. The credit amendments to the tax resulted in a scheme in which intrastate sales received a preferential fifty percent reduction in the rate of tax imposed and were given a maximum tax ceiling of $350. Out-of-state sales, however, were subject to the full tax rate without any ceiling. Because it imposed a greater tax liability on out-of-state sales than on in-state sales, the New York transfer tax fell "short of the substantially evenhanded treatment demanded by the [c]ommerce [c]lause." 429 U.S. at 332, 97 S.Ct. at 608.

Another tax statute whose discriminatory credits and exemptions provided the basis for a finding of unconstitutionality was the Louisiana statute reviewed in *Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981). There, a tax was imposed on certain uses of natural gas coming into the state. The tax was imposed to equalize competition between locally produced gas subject to the state's severance tax and gas coming into the

state from the outer continental shelf which was free of the severance tax. The use tax provided an exemption for gas consumed within the state. It also provided a tax credit against severance taxes for all use taxes paid, thereby encouraging investment in local mineral exploration and development and discouraging investment and development of the outer continental shelf and other states. The Court found the statute unconstitutional in light of the discriminatory effect produced by the pattern of credits and exemptions which violated the principle of equality. 451 U.S. at 759, 101 S.Ct. at 2135.

The circuit court here found that "the tax is on fuel purchased *in* the state and all consumers are taxed equally" and thus concluded that there is no burden on interstate commerce similar to that found in *Maryland v. Louisiana*. The court misconstrued the nature of the discrimination worked against interstate commerce by the corporate tax credit. The question is not one of whether Florida may impose this tax on fuel purchased in Florida for use in interstate commerce. Rather the issue is whether the tax with its attendant credit provision produces a discriminatory effect on interstate commerce. The credit provision of chapter 83-3 clearly discriminates against interstate commerce because the corporate tax credit provides a *direct commercial advantage* to Florida-based air common carriers over non-Florida-based carriers.

The circuit court also found *Boston Stock Exchange* inapplicable stating that, in the present case, "the legislature is not trying to tax any out-of-state transactions." The circuit court misconstrued the holding in *Boston Stock Exchange*. The United States Supreme Court in *Boston Stock Exchange* was not concerned with whether the transaction occurred in New York or outside the state, but whether the credit structure of the tax favored

in-state business and discriminated against interstate commerce.

The circuit court also relied on *Archer Daniels Midland Co. v. State*, 315 N.W.2d 597 (Minn. 1982). In *Archer Daniels* the Supreme Court of Minnesota struck down a tax credit statute similar to the Florida-based tax credit provided in chapter 83-3. Minnesota imposed an excise tax of thirteen cents per gallon on all gasoline sold in the state including gasohol. The taxing statute was amended in 1980 to provide a four cents per gallon partial exemption for gasohol made from Minnesota farm products and blended with alcohol distilled in Minnesota. A non-resident alcohol producer challenged the constitutionality of this statute alleging that the higher taxes imposed on non-resident producers discriminated against interstate commerce. The court found that the exemption violated the commerce clause noting that the act attempted to unfairly preserve local markets for local interests by conferring an artificial economic advantage to local interests under the state's taxing power. *Id.* at 599. The circuit court ruled that *Archer Daniels* dealt with out-of-state production or consumption and that chapter 83-3 in no way affects out-of-state production or consumption. This approach again overlooks the real issue in this case. Just as the Minnesota statute favored in-state gasohol producers, chapter 83-3 confers an artificial economic advantage on those interstate air carriers who maintain corporate or business home offices in Florida over those competing air carriers who base their corporate headquarters outside the state.

The circuit court continued its erroneous analysis under the commerce clause by referring to *Faircloth v. Mr. Boston Distiller Corporation*, 245 So.2d 240 (Fla. 1970), as supporting the proposition that this Court has upheld special tax exemptions to encourage Florida industry. The court's reliance on *Faircloth* is misplaced because that case involved a challenge to a state excise tax based

upon equal protection and due process arguments. The commerce clause was not an issue in that case.

The circuit court has misconstrued the analysis necessary to determine whether a statute discriminates against interstate commerce. The test under the commerce clause is, as we have noted, whether the statute discriminates against interstate commerce by providing a direct commercial advantage to local commerce. The corporate income tax credit provides a direct commercial advantage to select Florida-based air carriers and thereby violates the commerce clause.

In *Eastern*, 455 So.2d 311 (Fla. 1984), we discussed the proper analysis to determine whether a statutory provision was severable from the remainder of the statute. We find that the corporate tax credit provision, now section 220.189 (Florida Statutes 1983), can be logically separated from the remaining valid provisions of chapter 83-3 without hampering the legislature's intent to provide a transportation fund for the state. Thus, we strike that provision which extends a corporate income tax credit to Florida-based air carriers. We believe this will still accomplish the legislature's primary purpose—to tax corporations qualified to do business in Florida or actually doing business in Florida.

Delta also challenges section 6 of the law as being a road-user tax totally unrelated to the services provided by the state and thus violative of the commerce clause. Delta states in its brief that the first gas tax and the corresponding first four cents of the special fuel tax formerly imposed under chapter 206, Florida Statutes (1981), levied an *excise* tax specifically on road-users. Delta also refers to the new provision as "the new sales tax." However, the thrust of Delta's argument is that this tax is a *user* tax and, as such, fails the fourth prong of the text [sic] enunciated in *Complete Auto*. Delta argues that it and other interstate air common carriers do not use the roads in Florida and, therefore, the meas-

ure of the tax bears no relationship to Delta's presence or activities in the state.

We must disagree with Delta's argument. First, the tax is not a road-user tax. It is an excise tax imposed under part II of chapter 212, which is commonly referred to as the sales tax law of the state of Florida. The tax is imposed on the privilege of engaging in certain businesses, including the selling of motor fuels and special fuels in the state. *All purchasers* of motor fuel or special fuel are taxed on the incident of first withdrawal. The funds generated are to be deposited in a state transportation fund and are not, as Delta has asserted, to be restricted to only road use.

Our interpretation of this statute as an excise tax is consistent with prior United States Supreme Court decisions which reviewed similar statutes dealing with taxes on fuel used by airlines.

In 1933 the United States Supreme Court was faced with a challenge to a Tennessee statute which imposed an excise tax on the privilege of selling, storing, or distributing gasoline within the state. *Nashville, Chattanooga, & St. Louis Railway v. Wallace*, 288 U.S. 249, 53 S.Ct. 345, 77 L.Ed. 730 (1933). The proceeds of the tax were to be used solely in the construction and maintenance of a highway system in the state. The appellant rail carrier contended that the tax was in effect a tax upon the use of the gasoline in appellant's business as an interstate carrier and, thus, an unconstitutional burden on interstate commerce. *Id.* at 265, 53 S.Ct. at 349, 77 L.Ed. at 737. The court noted that gasoline having come to rest in storage is taxable by the state, notwithstanding its prospective *use* as an instrument of interstate commerce, much the same as a right of way, rolling stock, or other instruments of interstate commerce are subject to local property taxes. Accordingly, the Court stated:

> [T]here can be no valid objection to the taxation of the exercise of any right or power incident to ap-

> pellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson v. Kentucky*, [279 U.S. 245, 49 S.Ct. 279, 73 L.Ed. 683 (1929)], supra. Here the tax is imposed on the successive exercise of two of those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations. . . . .
>
> . . . [T]he levy is a tax, not a toll or charge for use of the highways. . . .

Id. at 268, 53 S.Ct. at 350.

In *Eastern Air Trasport, Inc. v. South Carolina Tax Commission*, 285 U.S. 147, 52 S.Ct. 340, 76 L.Ed. 673 (1932), the Supreme Court upheld a state tax on the sale of gasoline within the state. The suit was brought by an interstate air carrier which argued that the tax placed a direct burden on interstate commerce. The Court found that the tax, which was described in the statute as a license tax, was for the privilege of carrying on the business of selling gasoline. The Court emphasized that under the circumstances the validity of the tax would not be affected by whether the tax was construed to be an excise tax or a property tax. The Court stated:

> There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as

> imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected.

Id. at 153, 52 S.Ct. at 341.

Similarly, the Court upheld a Wyoming law which taxed all gasoline "used or sold" in the state and applied to all gasoline imported for use upon its withdrawal from storage tanks in *Edelman v. Boeing Air Transport, Inc.*, 289 U.S. 249, 53 S.Ct. 591, 77 L.Ed. 1155 (1933). The Court described the tax in the following manner.

> The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes either on coming into the State or on going out. It is at the time of withdrawal alone that "use" is measured for the purposes of the tax. The stored gasoline is deemed to be "used" within the State and therefore subject to the tax, when it is withdrawn from the tanks. . . .
>
> A State may validly tax the "use" to which gasoline is put in withdrawing it from storage within the State, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in *Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace*, supra. There it was pointed out that "there can be no valid objection to the taxation of the exercise of any right or power incident to . . . ownership of the gasoline which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson v. Kentucky*, 279 U.S. 245, 73 L.Ed. 683, 49 S.Ct. 279." As the exercise of the powers taxed, the storage and withdrawal

> from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations.

Id. at 252, 52 S.Ct. at 592 (emphasis supplied).

The Supreme Court of the United States has stated that the constitutional power of a state to tax does not depend upon the enjoyment of the taxpayer of any special benefit from the use of the funds raised by taxation. *Nashville, Chattanooga & St. Louis Railway v. Wallace*, 288 U.S. 249, 268, 53 S.Ct. 345, 350, 77 L.Ed. 730 (1933). A state is free to pursue its own fiscal policies, "if by the practical operation of a tax the state has exerted power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444, 61 S.Ct. 246, 250, 85 L.Ed. 267 (1940). *See also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 625, 101 S.Ct. 2946, 2957, 69 L.Ed.2d 884 (1981); *General Motors Corp. v. Washington*, 377 U.S. 436, 440-41, 84 S.Ct. 1564, 1567-68, 12 L.Ed.2d 430 (1964). The relevant inquiry under the fourth prong of the *Complete Auto* test is not, as Delta seems to suggest, the *amount* of the tax or the *value* of the benefits allegedly bestowed as measured by the costs the state incurs on account of the taxpayer's activities. *Commonwealth Edison*, 453 U.S. at 625, 101 S.Ct. at 2957. The first prong of *Complete Auto* clearly requires that the interstate business (here the airlines) have a substantial nexus with the state before *any* tax may be levied on it. The fourth prong of the test is intended to impose the additional limitation that the measure of the tax be reasonably related to the extent of the contact. *Id.* at 626, 101 S.Ct. at 2958; *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254, 58 S.Ct. 546, 548, 82 L.Ed. 823 (1938).

This tax is unlike a true "user fee" or user tax. Perhaps the best illustration of a true user tax is found in *Evansville-Vanderburgh Airport Authority v. Delta Air Lines, Inc.*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972). In *Evansville-Vanderburgh* the United States Supreme Court reviewed a use tax imposed on airlines by an Indiana municipality. All interstate air carriers were charged a user service charge for each enplaning passenger. The monies collected were to defray the cost of airport construction and maintenance. The tax was upheld and found to be fairly related to the use of the facilities by the airlines.

The present tax is more analogous to that found in *Commonwealth Edison* where the United States Supreme Court upheld a Montana severance tax on coal. Coal producers challenged the tax contending that the severance tax had a discriminatory effect on interstate commerce since ninety percent of Montana's coal was shipped out-of-state and, therefore, the tax burden was borne primarily by out-of-state consumers. The Court found that the coal producers' claim hinged on an inquiry into the fourth prong of *Complete Auto*. First, the Court concluded that, contrary to appellant's contention, the severance tax was a general revenue tax. 453 U.S. at 621, 101 S.Ct. at 2955. The Court also concluded that the fourth prong of *Complete Auto* was satisfied by the Montana tax. The Court stated:

> Because it is measured as a percentage of the value of the coal taken, the Montana tax is in "proper proportion" to appellants' activities within the State and, therefore, to their "consequent enjoyment of the opportunities and protections which the State has afforded" in connection with those activities.

Id. at 626, 101 S.Ct. at 2958 (citing *General Motors Corp. v. Washington*, 377 U.S. at 440-41, 84 S.Ct. at 1567-68).

We believe the imposition of this excise tax on the *purchase* of motor fuel and special fuel in the state of Florida is fairly related to those purchasers' enjoyment of the protections and benefits afforded by the state and the privilege of doing business in an organized society. Delta operates in at least nine of the major airports throughout the state of Florida transporting persons and property and engaging in the business of operating a commercial airline for profit. The persons and property which are transported through the air by airlines such as Delta do not come to rest at the airports. Those persons and any property generally must then use the public roads and highways of the state in automobiles or trucks or some other means of public transportation. We must disagree with Delta's contention that the tax is invalid because it is not fairly related to the services provided by the state.

Accordingly, we affirm that portion of the circuit court's order which upheld section 6 of the law as not being violative of the commerce clause. But, we reverse the circuit court's order insofar as it upheld the corporate tax credit to Florida-based airlines and strike that section of chapter 83-3.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON, McDONALD and SHAW, JJ., concur.

SUPREME COURT OF FLORIDA

DEPARTMENT OF REVENUE,
Appellant

v.

WARDAIR CANADA, LTD.,
Appellee

Reported at:

455 So.2d 326 (Fla. June 14, 1984), *rehearing denied*, Sept. 12, 1984

ADKINS, Justice.

This case is before us on an order from the First District Court of Appeal certifying the issue in the case to be of great public importance. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

This case arose with the filing of a complaint in the circuit court in Leon County by Wardair Canada, Ltd. (hereinafter Wardair) challenging the constitutionality of chapter 83-3, Laws of Florida. The court consolidated this case with an action filed by Air Jamaica for the purpose of trial. The parties stipulated to a procedure whereby the airline was allowed to self-accrue the sales tax imposed under chapter 83-3 during the pendency of the proceedings subject to certain conditions. The circuit court entered an order of final judgment on July 19, 1983, separate from its order in the Air Jamaica case. The court upheld the constitutionality of the law dismissing three of Wardair's counts in its complaint but ruled in favor of the airline in recognizing an exemption to the

airlines to the motor fuel and special fuel tax imposed by the law by virtue of certain executive agreements with the United States. The trial judge had previously upheld chapter 83-3 in *Delta Airlines, Inc. v. Department of Revenue*, No. 83-761 (Leon County Cir.Ct.—Civ.Div. May 23, 1983). The Department of Revenue filed its notice of appeal from the trial court's final judgment on July 21, 1983. Shortly thereafter, Wardair filed its notice of cross-appeal. The First District Court of Appeal then certified the case to this Court.

This Court has ruled on three of the four issues raised by Wardair in its original complaint and on cross-appeal in its decision in *Delta Airlines, Inc. v. Department of Revenue*, 455 So.2d 317 (Fla. 1984). The department has appealed the circuit court's ruling recognizing an exemption to the excise tax for the foreign airlines. The circuit court found that chapter 83-3 was inconsistent with a Non-scheduled Air Service Agreement between the United States and Canada, May 8, 1974, T.I.A.S. 7826.

The circuit court's order noted that article XII(1) of the Air Services Agreement exempts both the United States and Canada from national duties and charges on fuels and article XIV provides that neither party will discriminate against the other. The court then relied on its holding in *Lineas Aereas Costarricenses, S.A. v. Department of Revenue*, No. 83-761 (Fla. 2d Cir. June 21, 1983). In that case the court held that when the federal policy is to exempt foreign airlines from fuel taxes and prevent discrimination, the individual states are precluded from acting in that area.

The department argues that the agreement is inapplicable to estop the enforcement of chapter 83-3 for two reasons: 1) the agreement is not self-executing; and 2) the agreement specifically addresses only national customs, duties, excise taxes and charges with no application to or restriction on state taxation schemes. The circuit court did not expressly recognize a distinction between

executory and non-executory agreement provisions in its order.

The department asserts that the following provisions in the agreement are executory and thus require an additional legislative enactment to effect implementation:

> Each Contracting Party shall exempt the carriers of the other Contracting Party to the fullest extent possible under its national law from import restrictions, customs duties, excise taxes, inspection fees, and other national duties and charges on fuel, lubricants, consumable technical supplies . . . and other items intended for use solely in connection with the operation, maintenance or servicing of aircraft of the carriers of the other Contracting Party. The exemptions granted by this paragraph shall apply to items:
>
> (a) introduced into the territory of one Contracting Party by or on behalf of the carriers of the other Contracting Party;
>
> (b) retained on board aircraft of the carriers of one Contracting Party upon arriving in or leaving the territory of the other Contracting Party;
>
> (c) taken on board aircraft of the carriers of one Contracting Party in the territory of the other Contracting Party and intended solely for use in international air services; whether or not such items are consumed wholly within the territory of the Contracting Party granting the exemption.

Because we agree with the department's conclusion that the agreement is inapplicable because it specifically addresses only national customs, duties, and excise taxes and charges, we find it unnecessary to determine whether these provisions are executory or not. The Air Services Agreement is not a treaty ratified by the United States Senate. However, it is a formally executed international agreement and, as such, is valid and binding as if ap-

proved by act of Congress. *United States v. Pink*, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942). The purpose of the agreement is obviously to preserve, protect and promote the continued development of a system of air transport free from discriminatory practices and to support equal commercial opportunity between the nations.

The doctrine of preemption which is given effect through the supremacy clause mandates that federal law overrides any state regulation where there is an actual conflict between the two sets of legislation such that both cannot validly stand. The United States Supreme Court has formulated analytical standards for preemption. In *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941), the Court construed the Federal Alien Registration Act of 1940 to override Pennsylvania's Alien Registration Act of 1939. The Court noted that if state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," federal regulation must preempt state regulation to give effect to the desired national policy. *Id.* at 67, 61 S.Ct. at 404.

Fifteen years later the validity of a Pennsylvania state regulation was again before the Court in *Pennsylvania v. Nelson*, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640 (1956). The Court held that federal anticommunist legislation superseded the state's sedition act and enunciated a three-prong test to determine the supremacy of a federal regulatory scheme over state regulation in the same or similar area. The test involves an analysis of: 1) the pervasiveness of the federal regulatory scheme; 2) federal occupation of the field as necessitated by the need for national uniformity; and 3) danger of conflict between state laws and the administration of the federal program.

The provisions in the agreement between the United States and Canada clearly express an intent to apply to only national taxes and duties. We do not believe that the scheme of this agreement is so pervasive so as to per-

mit the reasonable inference that Congress intended to preclude the state's power to tax. Also, the competitive equality between the two nations would be destroyed if the United States air carriers had to pay state excise taxes on fuel purchases and the Canadian carrier did not.

We determined in our decision in *Delta Air Lines, Inc. v. Department of Revenue*, 455 So.2d 317 (Fla. 1984), that the tax imposed by chapter 83-3 met the four-prong test of *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), and thus did not violate the commerce clause. In 1979, the United States Supreme Court decided the case of *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979), setting forth two additional requirements to be met when foreign commerce is involved. The Court stated:

> [A]n inquiry more elaborate than that mandated by *Complete Auto* is necessary when a State seeks to tax the instrumentalities of foreign, rather than interstate commerce. In addition to answering the nexus, apportionment, and nondiscrimination questions posed in *Complete Auto*, a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second whether the tax prevents the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments." If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause.

Id. at 451, 99 S.Ct. at 1823.

The trial court correctly found that the first requirement of *Japan Line* was not a concern because there had been no de facto showing of multiple taxation or substantial risk of the same. *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267, 98 S.Ct. 2340, 57 L.Ed.2d 197; *Shell Oil Co. v. State Board of Equalization*, 64 Cal.2d 713, 51 Cal.Rptr. 524, 414 P.2d 820 (1966).

For the reasons previously discussed, we also hold that the tax meets the second requirement of *Japan Line*. The agreement provides for efforts at exemption from national excise taxes, inspection fees and other national charges but does not provide for exemptions from state excise taxes. We must presume this has been done intentionally. We do not believe this legislation prevents our federal government from speaking with one voice.

Accordingly, we affirm the order of the circuit court as to the constitutionality of chapter 83-3 except that portion of the law pertaining to a tax credit for Florida corporations. In *Delta* we determined that portion to be unconstitutional and it was stricken from the law. We reverse the circuit court to the extent that it recognized an exemption for foreign airlines.

It is so ordered.

ALDERMAN, C.J., and BOYD and SHAW, JJ., concur.

OVERTON, J., dissents with an opinion in which McDONALD, J., concurs.

OVERTON, Justice, dissenting.

I dissent. I find that the State of Florida has no authority to ignore valid air service agreements between the United States Government and the governments of other countries which exempt airlines based in participating nations from duties and charges on fuels. In my view, the individual states of this country are precluded by those agreements from taxing fuel used by foreign airlines. To accept the majority's view means that all United States airlines could, in turn, be subject to local government taxation on fuel in foreign countries. We are one country and our constitution requires us to speak with one voice when the federal government enters into agreements and treaties with foreign governments. *See* U.S. Const. art. I, § 8; art. VI. This state is precluded from enforcing this tax against this airline.

McDONALD, J., concurs.

APPENDIX C

DISTRICT COURT OF APPEAL
FIRST DISTRICT
TALLAHASSEE, FLORIDA 32301
Telephone No. (904) 488-6152

Date July 19, 1983

Case No. AT-305

DEPARTMENT OF REVENUE,
Appellant/Petitioner

vs.

LINEAS AREAS [sic] COSTARRICENSES, S.A.
Appellee/Respondent

ORDER

Upon consideration of appellant's Suggestion for Certification of Appeal and Rule 9.125, the Court certifies that the Final Judgment rendered by the trial court on June 14, 1983 requires immediate resolution by the Supreme Court.

[SEAL]

By Order of the Court

RAYMOND E. RHODES
Clerk

APPENDIX D

IN THE SECOND CIRCUIT COURT
IN AND FOR LEON COUNTY
FLORIDA

Case No. 83-964

LINEAS AEREAS COSTARRICENSES, S.A.,
a Costa Rican corporation,
Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Defendant.

FINAL JUDGMENT

This cause is before the Court on final hearing on the pleadings, evidence and arguments of counsel for the respective parties and the intervenors, and on the briefs of counsel for the parties, and the Court having considered all of same and being otherwise advised in the premises, it is

ORDERED AND ADJUDGED

1. The Plaintiff asserts that Senate Bill No. 8-A, Chapter 83-3, Laws of Florida, title "an act relating to transportation finance and administration":

COUNT I: discriminates against foreign airlines in violation of Congress' exclusive power over foreign commerce, pursuant to Article I, Section 8, Clause 3 of the United States Constitution,

COUNT II: is inconsistent with the Air Transport Services Agreements lawfully entered into by the President of the United States,

COUNT III: denies foreign airlines equal protection of the laws under the United States Constitution,

COUNT IV: violates Article I, Section 9, of the Florida Constitution because there is no reasonable relationship between the taxes imposed and the services provided to foreign airlines, and

COUNT V: is a special law in violation of Sections 10 and 11 of Article III of the Constitution of the State of Florida.

Plaintiff prays for a permanent injunction to prevent Defendant Department of Revenue (DOR) from assessing and collecting fuel taxes pursuant to Senate Bill 8-A.

2. In light of this Court's recent decision in *Delta Air Lines, Inc. v. State of Florida, Department of Revenue*, Case No. 83-761, (Leon County Circuit Court—Civil Division, May 23, 1983), the assertion [sic] in Counts I, III, IV, and IV [sic] are without merit. However, the Court finds merit in the assertion in Count II and hereby grants a permanent injunction for the reasons subsequently discussed. This Court upholds the constitutionality of Senate Bill 8-A but recognizes an exemption for foreign airlines based on the bilateral agreements entered into between the federal government and Plaintiffs and intervenors in this case.[1]

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[1] Commercial Air Transport Agreement, January 8, 1947, United States-Ecuador, T.I.A.S. 1606; Aviation Transport Services Agreement, October 24, 1956, United States-Colombia, T.I.A.S. 5338; Air Transport Services Agreement, April 13, 1953, United States-Venezuela, T.I.A.S. 2813; Air Transport Services Agreement, August 15, 1960, United States-Mexico, T.I.A.S. 4675; Air Transport Services Agreement, May 10, 1947, United States-Chile, T.I.A.S. 1905; Air Transport Services Agreement, September 22, 1977, United States-Argentina, T.I.A.S. 8978; Air Transport Services Agreement, February 11, 1946, United States-United Kingdom, T.I.A.S. 1507; Aviation Agreement, November 22, 1961, United States-United Kingdom, T.I.A.S. 4955; Memorandum of Consultations, April 25, 1982, United States-Brazil; Memorandum of Understanding, August 17, 1979, United States-Costa Rica.

DISCUSSION

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, vests with Congress the exclusive power to regulate foreign commerce. The Supremacy Clause, Article 4, Section 2, states that the Constitution and the laws made pursuant thereto are the supreme law of the land. Therefore, when Congress traditionally regulates in a certain area such as in the present case by extending reciprocal agreements to foreign airlines to "strengthen even more the cultural welfare and economic bonds . . . and ensure continued development in the common welfare on bases of equality and reciprocity", Air Transport Services Agreement with Mexico, p. 1, the states are preempted or superseded from acting in this area. Further, Congress has extended federal tax exemption from custom duties, inspection fees, excise taxes, and other national duties or charges to foreign airlines "in order to prevent discriminatory practices and to assure equality of treatment." Air Transport Services Agreement with Mexico, Article 7,[2] and that the respective authorities will attempt to facilitate maximum efficiency "with a fair and equal opportunity" for the airlines to operate on the designated routes. Mexico Agreement, Article 8.[3]

Defendant contends that the "fair and equal opportunity" refers only to routes and does not affect excise

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[2] Similar or equal provisions appear in the Air Transport Services Agreements listed in footnote 1 as follows: Venezuela Agreement—Article 4; Chile Agreement—Article 3; Ecuador Agreement —Article 3; United Kingdom Agreement—Article 3; Costa Rica Memorandum—Article 9; Brazil Agreement—Article 9; Colombia Agreement—Article 7; Argentina Agreement—Section 2(F).

[3] Similar or equal provisions appear in the Air Transport Services Agreements listed in footnote 1 as follows: Venezuela Agreement—Annex IV(b); Chile Agreement—Annex A.A; Ecuador Agreement—Annex Section 1.A; Costa Rica Memorandum—Article 9(5); Brazil Memorandum—Section IX; Colombia Agreement—Article 8; Argentina Agreement—Section 2(F).

tax imposition. Fuel is an essential factor in an airlines' [sic] operation, and if its price is increased, the cost to fly to a specific destination is likewise increased. This will adversely affect the economic feasibility of flying to that destination. The foreign airlines involved in this suit fly only between their country and specified cities in the United States. In Florida that city is Miami. They engage in no intrastate or interstate flights, but are confined to flights between their country and the specific city. If a particular state imposes a substantial increase in the cost of flying to a certain city, it is only logical that this disadvantage would inhibit the airlines' desire to continue flying to that city. Therefore, tax imposition does substantially affect the established route and denies the airlines a fair and equal opportunity to serve that route.

It is noteworthy that in the Argentina Agreement, Section 2(F)(3), the wording is that the civil aeronautics authorities will endeavor to ensure "exemption from taxes", without specifying exemption only from national taxes. Most of the agreements specify the referral is to national taxes and Defendant emphasizes this point in its brief as indicating Congress intentionally did not exempt state or local taxes. Consistent with this reasoning, however, Argentina could submit that the failure to specify would imply the federal government would make efforts to ensure exemption from all taxes—state, local, etc. In fact, the memorandum agreement with Costa Rica, Article 9(5) does in fact state that "each party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities".

In arguing that Congress' failure to specifically exempt state taxes in the majority of the agreements [sic] Defendant cites *Finland v. Town of Pelham*, 290 N.Y.S.2d (1966), to demonstrate an express statement of Congress in a treaty as compared to the non-express statements in

the present agreements. However, it cannot be concluded that whenever Congress does not speak to an issue that the intent is to affirm state regulation in that area by negative implication. Congress cannot be expected to speak to all aspects of a given situation. The United States Supreme Court spoke directly on this situation in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979):

> "The premise of Appellees' argument is that a State is free to impose demonstrable burdens on commerce, so long as Congress has not preempted the field by affirmative regulation. But it long has been 'accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.'" *Southern Pacific Company v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945).

Similarly, Defendant argues that the agreements between the United States and Costa Rica, Brazil, Trinidad and Tobago, and Honduras are executory and require affirmative legislative action to validate them. *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979). The court in *Postal* states at page 875:

> "it was early decided that treaties affect the municipal law of the United States only when those treaties are given effect by congressional legislation or are, by their nature, self-executing."

but goes on to say at page 876:

> "The question whether a treaty is self-executing is a matter of interpretation for courts when the issue

> presents itself in litigation . . . and, as in the case of all matters of interpretation, the court's attempt to discern the intent of the parties to the agreement so as to carry out their manifest purpose." [sic]

The agreements involved here have no express language that further legislation is necessary, and because, as will be discussed, the federal government recognizes these agreements as effective, this court discredits any argument that these agreements are ineffective because further legislative action is needed. As Plaintiff informs the Court, the challenged agreements are in effect pending exchange of ratification, and the Civil Aeronautics Board recognizes these agreements as effective by having granted Foreign Air Carrier Permits to Costa Rica and by recognizing the validity of the Brazil agreement in decisions. The T.I.A.S. agreements 1507, 4955, and 5209 govern air transportation with Trinidad and Tobago, such agreements made between the United Kingdom and United States. Although no T.I.A.S. agreement exists for Honduras, TAN, the national carrier, has been authorized by the Civil Aeronautics Board. C.A.B. Order 82-6-98 (June, 1982). Even if there were a valid distinction between the effectiveness of an executory agreement as opposed to an executed agreement, the Court here is examining the federal *policy* considerations behind the agreements and these considerations strongly indicate lenient tax burdens on foreign carriers. The agreements, executory or executed, are evidence of this policy as the Supreme Court stated in *United States v. Pink*, 315 U.S. 203, 231 (1941): as "superior Federal policy evidenced by a treaty or international compact or agreement."

Defendant argues in its brief that Plaintiff is trying to elevate the agreements to the status of treaties and appears to discredit this elevation; yet Defendant's cites involve treaties which implies Defendant's recognition of that status. *Pink* appears to treat international agreements with the same to status of treaties, so the distinction is irrelevant.

Regarding the non-express language in the agreements, Defendant cites *Guarantee Trust Co. v. United States*, 304 U.S. 126, 143 (1938):

> "Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them."

In the present case, it seems to be the state who is trying to override the privileges extended to foreign carriers by the federal government, not vice versa. All the bilateral agreements were in effect before Senate Bill 8-A, dating back to 1947 (Ecuador), 1948 (Chile), 1953 (Venezuela) etc. This would seem to indicate that the federal government had established their policy of reciprocal tax exemptions before the State acted. It is, therefore, the state who is impairing a federal right, not vice versa. Defendant also cites *United States v. Pink* at 230:

> "It is of course true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy."

However, *Pink* goes on to say at p. 231:

> "But state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international agreement."

Using the *Pink* analysis, derogation from the State's authority in this case is in fact necessary because the apparent policy expressed in the bilateral agreements is for reciprocal tax advantages. This precludes the state from acting in a manner to "frustrate the achievements [sic] of federal uniformity." *Japan Line*, p. 450. The federal concern for equal commercial opportunity between nations supports the policy of Congress to exempt foreign airlines from excise taxes.

The Supreme Court of the United States in *United States v. Belmont*, 301 U.S. 324, 331 (1947), has rather clearly stated the applicable principle as follows:

> "in the case of all international compacts and agreements . . . that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states."

The test to be used when a state attempts to regulate foreign commerce was articulated in *Japan Line*, page 451:

> "an inquiry more elaborate than that mandated by *Complete Auto* is necessary when a State seeks to tax the instrumentalities of foreign, rather than of interstate, commerce. In addition to answering the nexus, apportionment, and non-discrimination questions posed in *Complete Auto*, a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and second, whether the tax prevents the Federal Government from 'speaking with one voice' when regulating commercial relations with foreign governments."

The first requirement is not a concern in the present case because there has been no de facto showing of multiple taxation, and, as the court stated in *Moorman Manufacturing v. Bair*, 437 U.S. 267 (1978), the court will not invalidate a statute where the risk of multiple taxation is merely "speculative." It is the second requirement which concerns the court in the present case. It is not overlooked that in *Japan Line* the tax was an ad valorem levy on certain containers used in seagoing vessels of Japan, where as in this case the tax is upon the withdrawing of expendable fuel from storage. However, the principle of both seems applicable. The levy on the fuel, which is a sine qua non to movement of the aircraft,

seems to be within the class of burdens which the international agreements seek to prevent.

The United States, consisting of fifty individual state governments united under one flag, must present a united front when dealing in economic affairs with other nations. Over the years the federal government has negotiated these bilateral agreements to prevent price discrimination toward U.S. carriers in other nations, these being reciprocal agreements. There have been continuing efforts of the Civil Aeronautics Board to eliminate fuel taxes imposed by other nations.[4] Also, in 1974 Congress enacted the International Air Transportation Fair Competitive Practices Act, 88 Stat. 2102, to protect U.S. carriers from discrimination. By allowing the fifty states to impose individual state taxes, it would thwart the purpose of these federal efforts and infringe on the federal power to regulate foreign commerce.

Concern for Florida's fuel tax was expressed by the United States Department of State in a letter to the Florida Department of Revenue on September 29, 1982 from Matthew V. Scocozza, Deputy Assistant Secretary of State for Transportation and Telecommunication. This letter stated that the United States afforded an exemption from federal taxes and this [sic] if individual states imposed taxes it would "frustrate the international system of reciprocal tax exemptions and thereby significantly increase the cost of international air transportation." After reassurances from the Florida DOR in their letter of October 25, 1982, that airlines continued to enjoy "generous tax advantages", Senate Bill 8-A was enacted. The Department of State reacted by sending their letter of March 17,

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[4] Civil Aeronautics Board ("CAB"), Fiscal Year ("FY") 1982/1981 Report to Congress at 94-96; CAB, FY 1980 Report to Congress at 84; CAB, FY 1979 Report to Congress at 103; CAB, FY 1978 Report to Congress at 96; CAB, FY 1977 and Transition Quarter Report to Congress at 106-109, 114-115; CAB, FY 1976 Report to Congress at 103-104.

1982 (date is a typographical error and should read "1983") that the Department was "surprised and distressed" to hear of the changes in the Florida fuel tax as applied to airlines. Mr. Scocozza's first letter spoke of a "generally-accepted and long-standing international practice of reciprocally exempting such items from taxes".

In *Japan Line* at page 448 the Court talks of state taxes in reference to the second "national-uniformity" requirement:

> "a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential. Foreign commerce is pre-eminently a matter of national concern."

At page 449 of *Japan Line* the Court cites *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976) as follows:

> "the Federal Government must speak with one voice when regulating commercial relations with foreign governments."

The *Japan Line* court then discusses several ways a state tax may "frustrate the achievements [sic] of federal uniformity", page 450. Among these concerns are asymmetry in international tax structure and retaliatory taxes against American-owned instrumentalities present in other nations:

> "Such retaliation of necessity would be directed at American Transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer." Page 430. [sic; p. 450]

ACCORDINGLY, IT IS FURTHER ORDERED AND ADJUDGED:

A. This Court finds and determines that Chapter 83-3, Laws of Florida, also referred to as Senate Bill 8-A, is a valid enactment and is not in conflict with the Equal Protection clauses of the United States Constitution (14th

Amendment) nor the Florida Constitution (Article I, Section 2); nor with the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3) for the Reasons stated in *Delta Air Lines, Inc. v. State of Florida, Department of Revenue*, Case No. 83-761 (Leon County Circuit Court—Civil Division, May 23, 1983).

B. It is further found that Senate Bill 8-A is inconsistent with the undertakings of the United States government in international bilateral agreements with Plaintiff and intervenor foreign airlines.

C. Plaintiff's Counts I, II, IV, and V are hereby dismissed finally.

D. Plaintiff and Intervenors are granted a permanent injunction against Defendant DOR assessing and collecting fuel taxes pursuant to Senate Bill 8-A. Count II of Plaintiff's Complaint is meritorious.

E. This court upholds the constitutionality of Senate Bill 8-A, but recognizes an exemption from the fuel tax for Plaintiff and Intervenor foreign airlines who have entered executive agreements with the United States prior to the enactment of this Bill.

DONE AND ORDERED, at Tallahassee, Leon County, Florida, this 1st day of June, 1983.

/s/ Ben C. Willis
BEN C. WILLIS
Circuit Judge

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION

Case No. 83-964

LINEAS AEREAS COSTARRICENSES, S.A.,
a Costa Rican corporation,
Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Defendant.

ORDER

THIS CAUSE having come before the Court upon Plaintiff and Intervening Plaintiffs' Motion to Amend Final Judgment, and the Court having reviewed the file and being otherwise duly advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. Plaintiff and Intervening Plaintiffs' Motion to Amend Final Judgment is granted;

2. Paragraph C, on the final page of the Judgment, shall read as follows:

> "Plaintiff's Counts I, III, IV, and V are hereby dismissed finally."

3. Paragraph E, on the final page of the Judgment, shall read as follows:

> "This court upholds the constitutionality of Senate Bill 8-A, but recognizes an exemption from the fuel tax for Plaintiff and Intervenor foreign airlines

whose governments have entered into executive agreements with the United States prior to the enactment of this Bill, or who have been granted Foreign Air Carrier Permits by the United States on a basis of reciprocity and comity."

DONE AND ORDERED in Chambers, Tallahassee, Leon County, Florida, this 14th day of June, 1983.

/s/ Ben C. Willis
BEN C. WILLIS
Circuit Court Judge

APPENDIX E

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

Case No. 83-761

DELTA AIR LINES, INC.,
a Delaware Corporation, et al.,
Plaintiffs,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE, *et al.*,
Defendants.

FINAL JUDGMENT

This cause is before the Court on final hearing on the pleadings, evidence and argument of counsel for the respective parties, and on the briefs of counsel for the parties, intervenors and amicus curiae, and the Court having considered all of same and being otherwise advised in the premises, it is

ORDERED AND ADJUDGED:

1. The Plaintiff asserts that Senate Bill No. 8-A, Chapter 83-3, Florida Statutes, titled "an act relating to transportation finance and administration" violates

a) its constitutional right to equal protection under the United States and Florida Constitutions,

b) the Commerce Clause of the United States Constitution,

c) Article III, Sections 10 and 11 of the Florida Constitution.

Intervenor Eastern Airlines also asserts Senate Bill 8-A is an improper delegation of legislative authority. Plaintiff prays for declaratory and injunctive relief to prevent Defendant Department of Revenue (DOR) from assessing and collecting such tax.

2. Senate Bill 8-A was signed into law on March 8, 1983 to become effective April 1, 1983. It revises the tax structure of Chapters 206, 212, and 220, Florida Statutes. Prior to the enactment of said Bill motor fuel was taxed pursuant to Part I, Chapter 206 at the rate of 8 cents per gallon as follows:

a) a "first gas tax" of 4 cents to be used for maintenance and construction of state road [sic],

b) a "second gas tax" of 2 cents to be used by counties to secure bond obligations,

c) a "seventh-cent tax" used by counties for public transportation, and

d) an "eighth-cent tax" used by municipalities for transportation-related expenditures.

Prior to the enactment of Senate Bill 8-A, special fuel was taxed pursuant to Part II, Chapter 206 at the rate of 8 cents per gallon with distribution the same as Part I, Chapter 206. Aviation fuel was exempt from Part II.

Prior to the enactment of Senate Bill 8-A, pursuant to Chapter 212, common carriers paid a sales tax of 5% of the sales price of fuel, such tax accruing and being collected upon first withdrawal from the storage facility. This tax was prorated according to the ratio of the interstate mileage of the carrier to its total mileage for the previous fiscal year.

Prior to the enactment of Senate Bill 8-A, Chapter 220 imposed an income tax on corporations without credit for motor or special fuel taxes paid.

3. Senate Bill 8-A eliminates the "first gas tax" of Part I, Chapter 206 in 206.41 and reduces the special fuel tax in Part II from 8 cents to 4 cents. Distribution is the same as prior to enactment. Thus, under both Part I and Part II of Chapter 205 the tax is reduced from 8 cents to 4 cents per gallon.

Under Chapter 212, the Bill now imposes a 5% sales tax on motor and special fuel based on a predetermined price of $1.148, or 5.7 cents, per gallon until June 1, 1985, at which time the DOR will determine the price according to the most recent Consumer Price Index. Distribution is for "transportation purposes" per Section 206.46 from a Transportation Trust Fund. The Chapter 212 tax upon common carriers will continue to be prorated by intrastate mileage; however airlines will be taxed on all aviation fuel purchased in Florida, regardless of use in interstate or intrastate travel. Chapter 220 now affords a 50% or $5 million (the lesser) credit to Florida-based corporations with 1,200 or more employees.

4. Plaintiff objects to Senate Bill 8-A on the grounds it violated [sic] equal protection by subjecting them to different tax treatment than other common carriers, creates a classification which is discriminated against by higher tax rates, subjects them to a predetermined price not related to the actual price of aviation fuel, and discriminates against foreign corporations by allowing the Chapter 220 tax credit only to corporations with their corporate or home office in Florida.

Plaintiff alleges Senate Bill 8-A violates the United States Constitution Commerce Clause by exceeding the state limitations in taxing interstate commerce because the apportionment is unfair and not based on intrastate use, agricultural and fishing interests are favored by total fuel tax exemption, the tax credit is an attempt to force corporations to establish corporate offices in Florida, there is no nexus between the tax on airlines and the use of

funds for roads, and the tax is not fairly related to services provided to interstate airlines.

Plaintiff originally claimed Senate Bill 8-A violated Article III, Sections 10 and 11 of the Florida Constitution because it was a special law. However, in light of the recent Supreme Court decision in *Department of Legal Affairs, State of Florida, et al. v. Sanford-Orlando Kennel Club., Inc.*, 8 F.L.W., (Fla. April 14, 1983), in which the Court stated it did not matter that the legislature was aware the bill would benefit a certain business, Plaintiff has abandoned this allegation. Plaintiff had originally prayed for attorneys fees pursuant to 42 U.S.C. 1983 and 1988, which issue this court ruled against in a hearing May 11, 1983.

5. Plaintiff Delta Airlines is a Delaware corporation registered to do business in Florida and certified by the Civil Aeronautics Board. They operate from 9 airports in Florida and employ approximately 4,000 employees. Intervenors are various airlines subject to the fuel tax whose aggregate employees number approximately 1,800. None of the intervenors are qualified to receive the Chapter 220 tax credit either because of size or location outside Florida. Delta claims irreparable injury of $9.7 million per year without retroactive interest if Senate Bill 8-A is declared unconstitutional [sic], prolonged legal proceedings, individious discrimination without remedy, and competitive advantage to other classes of common carrers and Florida-based corporations. For these reasons, Plaintiff requests an immediate temporary injunction followed by a permanent injunction and declaratory relief.

6. Defendant DOR contends Senate Bill 8-A is a valid tax measure reasonably related to the legitimate state purpose of stabilizing tax structures and therefore is not subject to the constitutional infirmities urged by Plaintiff. Defendant contends that it has long been established that sales and use taxes imposed for the privilege of en-

gaging in business in the state are valid. *Gaulden v. Kirk*, 47 So.2d 567 (Fla. 1950); *Kirk v. Western Contracting Company, Inc.*, 216 So.2d 503 (Fla. 1 DCA 1968), *cert. den.* 225 So.2d 535, *app. dism.* 226 So.2d 815; *Florida Revenue Commission v. Maas Brothers*, Inc., 226 So.2d 849 (Fla. 1 DCA 1969), *cert. den.* 237 So.2d 177. Plaintiff elaborates on the point that Senate Bill 8-A is a user fee and not fairly related to the airlines' use of public facilities or roads. However, as Defendant points out, this is an excise tax, not a user fee, and "the constitutional power to levy taxes does not depend upon the enjoyment of the taxpayer of any special benefit from the use of the funds." *Nashville, Chattanooga, & St. Louis Railway v. Wallace*, 288 U.S. 249 (1933) at page 269.

EQUAL PROTECTION

The three main areas of Plaintiff's complaint in the equal protection area are: partial exemptions to other common carriers, predetermined price unrelated to actual price of aviation fuel, and discriminatory tax credit structure.

First, Plaintiff asserts that all common carriers should be treated alike and airlines should also receive the prorated treatment under Chapter 212 that other common carriers receive. Plaintiff cites cases to support this assertion that interstate carriers are "similarly situated" for tax purposes, *Seaboard Air Line Ry. v. Simon*, 47 So. 1001 (Fla. 1908) where all carriers are liable for lost or damaged goods; *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954) that imposition of taxes on aircraft must be the same as for riverboats; *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949) that water transportation taxed same as other carriers; *Delta Air Lines, Inc. v. State of Alabama*, No. CV-1162 (Cir. Ct. Montgomery, Ala. May 27, 1981) that airlines are not utilities and receive the same treatment as other transportation modes.

Defendant counters that states have wide latitude in taxation and creating classifications. In *Madden v. Kentucky*, 309 U.S. 83 (1940), the Supreme Court stated at page 88:

> "In taxation even more than in other fields, legislatures possess the greatest freedom of classification."

The Supreme Court has upheld tax classification in ad valorem taxation of corporations, *Lehnhausen v. Lakeshore Auto Parts Co.*, 410 U.S. 356 (1973), *reh. den.* 411 U.S. 910; and exempting non-residents from ad valorem taxes on merchandise held in warehouses, *Allied Stores of Ohio v. Bowers*, 348 U.S. 522 (1959), where the Court states there is "no iron rule of equality prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation", p. 526.

The courts of Florida have followed *Lehnhausen, Madden*, and *Allied Stores* in *Markham v. Yankee Clipper Hotel, Inc., et al.*, 427 So.2d 383 (Fla. 4th DCA, 1983); and in *Just Valuation & Taxation League, Inc. v. Simpson*, 209 So.2d 229 (Fla. 1968), in which the Florida Supreme Court states at p. 232:

> "the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."

The Florida Supreme Court has upheld the constitutionality of Chapter 212 in *Gaulden v. Kirk*, 47 So.2d 567 (Fla. 1950) where a 3% tax was imposed on rentors and lessors of living quarters, but accommodations rented for longer than 6 months and two-family apartment buildings were exempt. The court held this to be a reasonable classification. Likewise the distinction between airlines and other carriers is a reasonable classification and Plain-

tiff has not sustained its burden to "negative every conceivable basis which might support it". *Just Valuation, supra.*

Plaintiff maintains that this distinction is arbitrary and unreasonable and will not pass constitutional muster, citing *Hartford Steam Boiler Inspection and Insurance Co. v. Harrison*, 301 U.S. 459 (1937), to support the allegation that two different forms of business cannot be treated differently. Plaintiff states that airlines and common carriers have been treated similarly for fuel tax purposes since 1963, and that the new bill singles out airlines to pay a disproportionate share of tax. However, Plaintiff does not sustain its burden to demonstrate this classification is "hostile and oppressive" per *Just Valuation*, and this court therefore holds there is no invidious discrimination by creation of an arbitrary classification. Classifying airlines differently from vessels and railroads for fuel tax purposes is not arbitrary. Airlines enjoy advantages and must tolerate some disadvantages due to their distinctive nature. For example, airlines enjoy the advantage of being exempt from ad valorem taxes on the lease of property from the county or other governmental unit pursuant to Chapter 80-368. Vessels and railroads are not exempt. Even though Plaintiff argues that 80-368 also benefits hotels, restaurants, and racetracks, it does not object to this favorable classification and only when disadvantaged does Plaintiff object. Also, proration of mileage for aircraft has proven difficult in the past because of flight patterns over the Gulf of Mexico and Atlantic Ocean to avoid accumulation of intrastate mileage. Defendant approximates that in the past airlines were paying only about 6% of their actual tax due to these flight patterns to avoid flying over the state.

Second, Plaintiff asserts the predetermined price of $1.148 per gallon is not related to the actual price of aviation fuel which customarily is less expensive and at the time of writing was about $.90 per gallon. Plaintiff would have

the DOR adjust the price as market price fluctuates at [sic] tax aviation fuel at the lower rate. This suggestion is not feasible because of the varying prices in different locations, the volatile nature of gas prices, and the objective of the legislature to have a stabilized tax structure. Rather than discriminate against airlines, the legislature has imposed a set price per gallon and all consumers are taxed equally regardless of nature of transport. The tax is levied on first withdrawal from the storage tanks and not at the retail level which latter price would be relatively impossible to ascertain. Plaintiff urges the court to allow the airlines to self-assess taxes as in the past and insists there have been no problems previously. However, as DOR points out, the discrepancy in self assessment renders this point meritless. For the foregoing reasons, this court holds the predetermined price structure does not invidiously discriminate against airlines.

Third, Plaintiff maintains the Chapter 220 tax credit structure favors local business and disadvantages foreign corporations registered in Florida but without a home office there. Plaintiff cites *Department of Revenue v. Amrep*, 358 So.2d 1343 (Fla. 1978) for the proposition that once a corporation is admitted to be registered in a state, it enjoys the full equal protection of the law. This is true, but it also must bear the cost of being privileged to do business in the state. Plaintiff contends that state attempts to tax foreign corporations more stringently than domestic corporations have been invalidated in *Wheeling Steel Corporation v. Glander*, 337 U.S. 562 (1949) dealing with intangible tax on accounts receivable; and *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968) which afforded out-of-state non-profit corporations tax exemptions equal to domestic non-profit corporations; and *O'Connell v. Kontojohn*, 179 So. 802 (Fla. 1938) which invalidated a discriminatory Pensacola tax based on non-city residents who operated bakery trucks in that city. However, the Senate Bill 8-A tax credit is valid because there is a rational basis behind allowing such credit

for domestic corporations: encouraging foreign corporations to establish home offices in Florida. Further, the Supreme Court states in *Carmichael v. Southern Coal & Coke Company*, 301 U.S. 495 (1936) at page 509:

> "The legislature is not bound to tax every member of a class or none, but may make distinctions of degree having a rational basis."

Therefore, if the legislature reasonably believes a tax credit for domestic corporations will further its objective of encouraging in-state incorporation, it may afford this more favorable treatment without discrimination. Just as the legislature enjoys wide latitude in taxation and classifications, it has wide latitude in promoting business where the public interest is served. *Carmichael* at page 512. In *Sanford-Orlando Kennel Club, supra*, the Florida Supreme Court states that the legislature may benefit a certain class so long as it is not unreasonable. There is no unreasonable burden on airlines to establish a home office in Florida if they wish to receive a tax credit. Also, this tax credit is on corporation income tax, not on the sales tax, so a corporation must first pay corporate income tax to avail itself of the Chapter 220 credit. For these reasons, this court holds the tax credit does not favor local business nor discriminate against foreign corporations.

COMMERCE CLAUSE

Plaintiffs contend that Senate Bill 8-A is a state attempt to regulate commerce between the states and exceeds state limitations pursuant to the United States Constitution, Article I, Section 8, Clause 3 grant to Congress. Assuming this bill affects interstate commerce, the state tax must meet the four prongs of *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), set out on page 278 of that opinion:

1) activity taxed has a sufficient nexus with the State,

2) the tax may not discriminate against interstate commerce,

3) the tax must be fairly apportioned; and

4) the tax must be related to services provided by the state.

Plaintiff contends that Senate Bill 8-A fails at least two prongs of this test because this is a road tax unrelated to airline services, and because the tax is not fairly apportioned and favors certain carriers and local businesses. Plaintiff insists this is a "user" tax because Governor Graham called this session to raise $250 million to fund road construction and maintenance. However, the working of section 206.46 specifically eliminated reference to "construction and maintenance of state roads" in allocation funds from the State Transportation Trust fund into which the fuel taxes are deposited. Instead, the section is worded to provide funds for "transportation purposes" which includes airport and aircraft services, contrary to the assertion of Plaintiff. Plaintiff maintains that because these funds are used for roads and airlines do not use roads, the tax is unrelated to services provided by the state. This is obviously not the case, as the legislature expressly included all transportation purposes in the allocation of funds.

Plaintiff attempts to convince the court that this is a user tax and not an excise tax and is therefore subject to a higher standard of scrutiny. This argument is flawed. As previously noted, favoring local businesses is not necessarily unreasonable or arbitrary. In the case of the Chapter 220 tax credit, Plaintiff is not unreasonably disfavored as there is a legitimate state purpose in encouraging corporate home offices to locate in Florida and to otherwise attract industry to the state. Plaintiff can merely incorporate in Florida if it wishes to receive the credit. Use of public airport facilities is a privilege the airlines enjoy and they should share the cost of these

facilities so long as the cost is reasonable. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) supports this statement and goes on to say that courts should not inquire into the amount of the tax or value of benefit received. In *Montana*, a severance tax on coal mined in Montana was upheld as a general revenue tax even though 90% was shipped out of state. Plaintiff tries to distinguish this case, saying Senate Bill 8-A is a use tax. However, this distinction does not withstand scrutiny. The court in *Montana* made it very clear that a state can regulate interstate commerce so long as there is no discrimination. In the case at bar the tax is levied upon all consumers equally based on the quantity of fuel withdrawn and there is no discrimination. The Supreme Court of the United States also deferred to the legislature in establishing tax measures in *Montana*. In *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), a "use" charge for enplaning passengers was upheld as rationally related to the use of facilities, even though such charge was "imperfect". Therefore, even if the Florida fuel tax were considered a use tax, this tax is valid because the funds are allocated for "public transportation" including air facilities, and according to *Montana* the benefit does not have to be measured with mathematical accuracy. The *Complete Auto* test prong #4 does not require a proportional relation of tax to benefit receive, but only requires that the tax be related to the services provided. *Complete Auto* also states that interstate commerce must pay its own way, similar to the reasoning in *Montana*.

To supports [sic] its contention that Senate Bill 8-A favors local business by extending a tax credit only to Florida-based corporations, Plaintiff cites *Maryland v. Louisiana*, 451 U.S. 725 (1981) where a tax on natural gas pumped out-of-state created a burden on interstate commerce. Here the tax is on fuel purchased *in* the state and all consumers are taxed equally so there is no similar

burden on interstate commerce. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977) involves a New York statute which taxed out-of-state transfers. Here the legislature is not trying to tax any out-of-state transactions. In *Archer Daniels Midland Co. v. State*, 315 N.W.2d 597 (Minn. 1982), a tax exemption for gasohol produced from Minnesota products with no comparable exemption for out-of-state product production, was declared invalid as a restriction on interstate commerce. Senate Bill 8-A in no way affects out-of-state production or consumption. The Florida Supreme Court has upheld special tax exemptions to encourage Florida industry. *Faircloth v. Mr. Boston Distiller Corp.*, 245 So.2d 240 (Fla. 1970). This court likewise finds there is no burden on interstate commerce by Senate Bill 8-A and no violation of the Commerce Clause.

IMPROPER DELEGATION OF LEGISLATIVE AUTHORITY

Intervenor Eastern Airlines raises an additional point that Senate Bill 8-A is an improper delegation of legislative authority by allowing the DOR to determine the fuel fixed price after June 1, 1985. *Gindl v. Department of Education*, 396 So.2d 1105 (Fla. 1979, corrected on rehearing 1981) allows the Department of Education to appropriate state funds to a state agency based on the Florida Price Level Index. The method of appropriation in Senate Bill 8-A is equivalent to the *Gindl* method and is a proper delegation of authority.

SEVERABILITY

Both parties agree that this bill should not be severed in part. Additionally, there is no severability clause in the bill. However, in view of the rulings made herein, it is unnecessary to consider or determine any questions of severability.

ACCORDINGLY, IT IS FURTHER ORDERED AND ADJUDGED:

A. This Court finds and determines that Chapter 83-3, Laws of Florida, also referred to as Senate Bill 8-A, is a valid enactment and is not in conflict with the Equal Protection clauses of the United States Constitution (14th Amendment) nor the Florida Constitution (Article I, Section 2); nor with the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3).

B. It is further found that the reference to the Consumer Price Index in future applications of the price per gallon to be used in computing the tax is not an unlawful delegation of legislative power. The Consumer Price Index is a computation by governmental agency of average prices of items of commerce. Reference to this measure is not a delegation of legislative discretion but an economic computation relied upon to apply a legislative policy of a tax based upon an approximate price prevailing at a given time.

C. All challenges to the validity of this statute are found to be without merit.

D. All prayers that the Defendant Department of Revenue be restrained from enforcement of Chapter 83-3 or collecting taxes imposed thereon are hereby denied.

E. The Amended Complaint and this cause be and the same are hereby dismissed finally.

DONE AND ORDERED, this 23rd day of May, 1983.

/s/ Ben C. Willis
BEN C. WILLIS
Circuit Judge

APPENDIX F

IN THE SUPREME COURT
STATE OF FLORIDA

Case No. 63,989

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellants/Cross Appellees,

v.

LINEAS AEREAS COSTARRICENSES, S.A., *et al.*,
Appellees/Cross Appellants.

[Filed June 29, 1984]

Appeal From the Second Circuit
Court in and for Leon County

APPELLEES' MOTION FOR REHEARING

DAVID A. NELSON
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100 Chopin Plaza
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Phone (305) 577-8700

Attorneys for
Appellees/Cross Appellants

APPELLEES' MOTION FOR REHEARING

Pursuant to Rule 9.330(a) of the Florida Rules of Appellate Procedure, Appelles respectfully move for rehearing of the decision filed herein on June 14, 1984.

The points of law or fact justifying such rehearing are these:

1. The United States government has entered into air transport agreements specifically addressing excise taxes imposed on fuel "by State, regional and local authorities" and establishing a policy of reciprocal exemption from such taxes.

2. By virtue of "Most Favored Nation" provisions contained in several other international agreements, the United States has agreed to extend the protection of these state tax provisions to a number of additional foreign nations.

3. The provisions of the agreements and treaties in question bring this case within the "speaking with one voice" principle of *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979).

In *Department of Revenue v. Wardair Canada, Ltd.*, No. 64,036 (Fla. June 14, 1984), this Court determined that the tax exemption provisions of the Non-Scheduled Air Service Agreement between the United States and Canada were inapplicable because that agreement "specifically addresses only *national* customs, duties, excise taxes and charges . . . ." Slip Op., p. 3. (Emphasis supplied.) *Wardair* was held to be controlling in *Department of Revenue v. Air Jamaica Ltd.*, No. 64,035 (Fla. June 14, 1984), and the instant case was disposed of solely on the basis of the decisions in the companion cases.

Unlike the Canadian agreement involved in *Wardair*, the air transport agreements that the United States has concluded with several of the countries whose carriers are

parties to this case and the *Air Jamaica* case deal expressly with *state* taxes as well as *national* taxes. The agreement with Costa Rica, introduced in the Court below as part of plaintiffs' Exhibit 2 (R370-71), is illustrative: Article 9 of the agreement (a copy of which is attached hereto as an Appendix) specifically refers in paragraph 1 to excise taxes on fuel, among other things; provides in paragraph 2(c) that fuel, lubricants and consumable technical supplies "shall . . . be exempt" from such taxes on a reciprocal basis; and mandates in paragraph 5 that each party use its best efforts to secure for the other parties' airlines "an exemption from taxes, duties, charges and fees *imposed by State, regional and local authorities* on the items specified in paragraphs (1) and (2) of this Article . . . ." (Emphasis supplied.)

A similar undertaking with respect to "taxes, duties, charges and fees imposed by State, regional and local authorities" is found in Article 10(6) of the protocol of April 4, 1979, between the governments of the United States and Jamaica relating to air transport, T.I.A.S. 9613, amending the Air Transport Services Agreement of October 2, 1969, T.I.A.S. 6770. *See also* the agreements identified at page 4 of the trial court's judgment in *Air Jamaica*, set forth as an Appendix to Appellee's Answer Brief herein.

The air transport agreements that address state taxes by name clearly reflect a federal policy in favor of reciprocal exemption from excise taxes at the state level. "A proliferation of state and local taxes," the United States Department of State has confirmed, "would frustrate the international system of reciprocal tax exemptions . . . ." Plaintiff's Exhibit 6, R373-74. Speaking specifically of the Florida tax at issue here, the State Department advised the Florida Department of Revenue that failure to exclude foreign airlines from the tax "will cause serious foreign relations problems." *Id.*

The impact of these provisions is not limited to nations whose aviation agreements with the United States specifically include them. The Treaty of Peace, Amity, Navigation and Commerce between the United States and New Granada [now Colombia] 9 Stat. 881, TS 54 (1848), cited by the Appellees [Answer Brief at 8] provides that "any particular favor [granted] to other nations, in respect of commerce and navigation," shall "immediately become common to the other party . . . ." Other treaties with provisions of the same general import are also cited in Appellees' Answer Brief. By extending the provisions regarding state taxation of airlines such as those found in the agreement with Costa Rica to many other nations, these most favored nation provisions further establish the uniform international policy of the United States favoring reciprocal exemption of airlines from state and local fuel taxes.

Because the United States has entered into air transport agreements expressly addressing state taxes, the necessity for federal uniformity is even clearer here than it was in *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). The California property tax at issue in that case was *not* specifically addressed in the Customs Convention on Containers which this country had concluded with Japan, 441 U.S. at 452, but the United States Supreme Court nevertheless held that the California tax could not be applied to Japanese containers for the reason, among others, that it prevented the federal government from "speaking with one voice" in international trade. It follows *a fortiori*, we submit, that the "negative implications of Congress' power to 'regulate Commerce with foreign Nations' under the Commerce Clause," 441 U.S. at 449, preclude Florida from imposing an excise tax on fuel used by the foreign air carriers here.

The motion for rehearing should be granted.

Respectfully submitted,

/s/ N. Fraser Schuh, III
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Attorneys for Appellees/
Cross Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Rehearing was sent by United States Mail, postage prepaid, this 27th day of June, 1984, to LARRY LEVY, ESQ., General Counsel, Department of Revenue, Carlton Building, Room 203, Tallahassee, Florida 32301; JOSEPH C. MELLICHAMP, III, ESQ., Assistant Attorney General, Department of Legal Affairs, The Capitol, LL04, Tallahassee, Florida 32301; and JAMES E. TRIBBLE, ESQ., Blackwell, Walker, Gray, Powers, Flick & Hoehl, Suite 2400, AmeriFirst Building, 1 S.E. 3rd Avenue, Miami, Florida 33131.

/s/ N. Fraser Schuh, III
Attorney for Appellees

APPENDIX

AIR TRANSPORT AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE REPUBLIC OF COSTA RICA

* * * *

ARTICLE 9

Customs Duties and Taxes

(1) On arriving in the territory of one Party, aircraft operated in international air transportation by the designated airlines of the other Party, their regular equipment, ground equipment, fuel, lubricants, consumable technical supplies, spare parts, including engines, aircraft stores (including but not limited to such items as food, beverages and liquor, tobacco and other products destined for sale to or use by passengers in limited quantities during the flight), and other items intended for or used solely in connection with the operation or servicing of aircraft engaged in international air transportation shall be exempt, on the basis of reciprocity, from all import restrictions, property taxes and capital levies, customs duties, excise taxes, and similar fees and charges imposed by the national authorities, and not based on the cost of services provided, provided such equipment and supplies remain on board the aircraft.

(2) There shall also be exempt, on the basis of reciprocity, from the taxes, duties, fees and charges referred to in paragraph (1) of this Article, with the exception of charges based on the cost of the service provided:

(a) aircraft stores introduced into or supplied in the territory of a Party and taken on board, within reasonable limits, for use on outbound aircraft of a designated airline of the other Party engaged in international air transportation, even when these stores are to be used on

a part of the journey performed over the territory of the Party in which they are taken on board;

(b) ground equipment and spare parts including engines introduced into the territory of a Party for the servicing, maintenance or repair of aircraft of a designated airline of the other Party used in international air transportation; and

(c) fuel, lubricants and consumable technical supplies introduced into or supplied in the territory of a Party for use in an aircraft of a designated airline of the other Party engaged in international air transportation, even when these supplies are to be used on a part of the journey performed over the territory of the Party in which they are taken on board.

(3) Equipment and supplies referred to in paragraphs (1) and (2) of this Article may be required to be kept under the supervision or control of the appropriate authorities.

(4) The exemptions provided for by this Article shall also be available where the designated airlines of one Party have contracted with another airline, which similarly enjoys such exemptions from the other Party, for the loan or transfer in the territory of the other Party of the items specified in paragraphs (1) and (2) of this Article.

(5) Each Party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on the items specified in paragraphs (1) and (2) of this Article, as well as from fuel through-put charges, in the circumstances described in this Article, except to the extent that the charges are based on the actual cost of providing the service.

APPENDIX G

IN THE SUPREME COURT OF FLORIDA

Wednesday, September 12, 1984

Case No. 63,989

Circuit Court Case No. 83-964 (Leon)

DEPARTMENT OF REVENUE,
Appellant/Cross Appellee,

vs.

LINEAS AEREAS COSTARRICENSES, *et al.*,
Appellee, Cross Appellant.

On consideration of the motion for rehearing filed by attorneys for appellee/cross-appellant, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

BOYD, C.J., ADKINS, OVERTON, ALDERMAN, McDONALD and SHAW, JJ., Concur

C

cc: Hon. Paul F. Hartsfield,
Clerk
Hon. Ben C. Willis,
Chief Judge
David A. Nelson,
Esquire
and N. Fraser Schuh, III,
Esquire
Joseph C. Mellichamp, III,
Esquire
Larry Levy,
Esquire
James E. Tribble,
Esquire

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Debbie Causseaux
Deputy

APPENDIX H

IN THE SUPREME COURT
STATE OF FLORIDA

Case No. 63,989

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellants/Cross Appellees,

v.

LINEAS AEREAS COSTARRICENSES, S.A., *et al.*,
Appellees/Cross Appellants.

[Filed Sept. 14, 1984]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Plaintiff/Appellee/Cross Appellant, LINEAS AEREAS COSTARRICENSES, and Intervening Plaintiffs/Appellees/Cross Appellants, TRANSPORTES AEREOS NACIONALES, S.A., AEROLINEAS ARGENTINAS, AERONAVES DE MEXICO, S.A., AEROVIAS NACIONALES DE COLOMBIA, S.A., TRINIDAD AND TOBAGO (BWIA INTERNATIONAL) AIRWAYS CORP., EMPRESA ECUATORIANA DE AVIACION, S.A., COMPANIA MEXICANA DE AVIACION, S.A., DE C.V., VIACAO AEREA RIO-GRANDENSE and VENZOLANA INTERNACIONAL DE AVIACION, S.A., appeal to the Supreme Court of the United States from the Final Decree of the Supreme Court of Florida affirming that portion of the Circuit Court's

Order upholding the Florida tax on aviation fuel as constitutional and reversing that portion of the Circuit Court's Order insofar as it upheld the corporate tax credit to Florida-based airlines and recognized an exemption from the tax for foreign airlines, entered in this action on June 14, 1984, rehearing denied September 12, 1984.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagrah (2).

DATED September 13, 1984.

/s/ N. Fraser Schuh, III
N. FRASER SCHUH, III
SQUIRE, SANDERS & DEMPSEY
Attorneys for Plaintiffs/
Appellees/Cross Appellants
Suite 3000, Miami Center
100 Chopin Plaza
Miami, Florida 33131
Phone—(305) 577-8700

AFFIDAVIT OF SERVICE BY MAIL

STATE OF FLORIDA :
: ss
COUNTY OF DADE :

I, N. FRASER SCHUH, III, depose and say that I am an attorney in the office of Squire, Sanders & Dempsey, attorneys of record for Plaintiffs/Appellees/Cross Appellants, LINEAS AEREAS COSTARRICENSES, S.A., TRANSPORTES AEREOS NACIONALES, S.A., AEROLINEAS ARGENTINAS, AERONAVES DE MEXICO, S.A., AEROVIAS NACIONALES DE COLOMBIA, S.A., TRINIDAD AND TOBAGO (BWIA INTERNATIONAL) AIRWAYS CORP., EMPRESA

ECUATORIANA DE AVIACION, S.A., COMPANIA MEXICANA DE AVIACION, S.A., DE C.V., VIACAO AEREA RIO-GRANDENSE and VENZOLANA INTERNACIONAL DE AVIACION, S.A., and that on September 13, 1984, pursuant to Rule 28, Rules of the Supreme Court, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on each of the parties required to be served herein, as follows:

On Defendant/Appellant/Cross Appellee, STATE OF FLORIDA DEPARTMENT OF REVENUE, by mailing copies in duly addressed envelopes, with first class postage prepaid, to LARRY E. LEVY, ESQ., General Counsel, State of Florida, Department of Revenue, Room 203, Carlton Building, Tallahassee, Florida 32301; and to JOSEPH C. MELLICHAMP, ESQ., Assistant General Counsel, Department of Legal Affairs, The Capital, Tallahassee, Florida 32301.

All parties required to be served have been served.

/s/ N. Fraser Schuh, III
N. FRASER SCHUH, III

SWORN TO AND SUBSCRIBED before me this 13th day of September, 1984.

/s/ [Illegible]
Notary Public

My commission expires:

APPENDIX I

List of the Appellants in this Proceeding
Indicating Their Parent Companies, Subsidiaries
(Except Wholly-Owned Subsidiaries), and Affiliates

AEROLINEAS ARGENTINAS

a. Parent Companies:

Aerolineas Argentinas is owned by the Government of Argentina.

b. Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates:

1. Buenos Aires Catering, S.A.

AERONAVES DE MEXICO, S.A. (AEROMEXICO)

a. Parent Companies:

Aeronaves de Mexico, S.A. is owned by the Government of Mexico.

b. Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates:

1. Cargo Transportation Datatronic, S.A.
2. Empresa Mexicana de Transporte Multimodal, S.A.
3. Telefonos de Mexico, S.A.
4. Transportacion Aerea Mexicana, S.A. de C.V.
5. Turborreactores, S.A. de C.V.

AEROVIAS NACIONALES DE COLOMBIA, S.A. (AVIANCA)

a. Parent Companies:

none

b. Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates:

1. Sociedad Aeronautica de Medellin Consolidada, S.A. (SAM)
2. Helicopteros Nacionales de Colombia, S.A. (HELICOL)
3. Corporacion de Viajes Ltda. (COVIAJES)
4. Aerocomercio Internacional Ltda.
5. Sociedad Productora y Comercializadora de Alimentos Ltda.

COMPANIA MEXICANA DE AVIACION, S.A. DE C.V. (MEXICANA AIRLINES)

a. Parent Companies:

A majority of the shares of Compania Mexicana de Aviacion, S.A. de C.V. are owned by the Government of Mexico.

b. Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates:

1. Aeropuertos y Terrenos S.A.
2. Cargo Transportation Datatronic S.A.
3. Transportacion Aerea Mexicana, S.A. de C.V.
4. Turborreactores, S.A. de C.V.

EMPRESA ECUATORIANA DE AVIACION (ECUATORIANA)

a. Parent Companies:

Empresa Ecuatoriana de Aviacion is owned by the Government of Ecuador.

b. Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates:

none

LINEAS AEREAS COSTARRICENSES, S.A. (LACSA)

a. Parent Companies:

none

b. Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates:

1. Hoteles, Restaurantes y Cafeterias de Iberoamerica, S.A.
2. Inversiones Aerolandia, S.A.
3. Pathfinder Tours, Inc.
4. Servicios Aereos Nacionales, S.A.

TRANSPORTES AEREOS NACIONALES, S.A. (TAN AIRLINES)

a. Parent Companies:

none

b. Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates:

1. Aerovias Nacionales de Honduras, S.A.
2. Budget Rent-a-Car, Honduras
3. Credomatic de Honduras, S.A.
4. Financiera Centroamericana, S.A.
5. General Air Services, Inc.
6. Hoteles de Honduras, S.A.
7. Servicio Aereo de Honduras, S.A.
8. Servicios Tecnicos Especializados

TRINIDAD & TOBAGO AIRWAYS CORPORATION (BWIA INTERNATIONAL AIRLINES)

a. Parent Companies:

Trinidad & Tobago Airways Corporation is owned by the Government of Trinidad & Tobago.

b. Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates:

1. Airline Caterers, Ltd.

VIACAO AEREA RIO-GRANDENSE, S.A. (VARIG)

a. Parent Companies:

Viacao Aerea Rio-Grandense, S.A. is owned by the Government of Brazil.

b. Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates:

1. Agripec S.A. Agropecuaria, Industria, Comercio e Exportacao
2. Companhia Tropical de Hoteis
3. Companhia Tropical de Hoteis—Amazonia
4. Companhia Tropical de Hoteis do Nordeste
5. Companhia Tropical—Hotel Santarem
6. Companhia Tropical—Hotel Tambau
7. Expressao Brasileira de Propaganda Ltda.
8. Hotel de Bahia, S.A.
9. Icaro Editora Ltda.
10. RIO-SUL, Servicos Aereos Regionais, S.A.
11. Servicos Auxiliaries de Transporte Aereo, S.A. (SATA)
12. Sociedade Brasileira de Turismo Aereo—"ROTATUR", Ltda.

APPENDIX J

Fla. Stat. Ann. § 212.08(4) (West Supp. 1984)

212.08 Sales, rental, storage, use tax; specified exemptions

The sale at retail, the rental, the use, the consumption, the distribution, and the storage to be used or consumed in this state of the following tangible personal property are hereby specifically exempt from the tax imposed by this chapter.

* * * *

(4) Exemptions, items bearing other excise taxes, etc.—

(a) Also exempt are:

1. Water (not exempting mineral water or carbonated water).

2. All fuels used by a public or private utility, including any municipal corporation or rural electric cooperative association, in the generation of electric power or energy for sale. Fuel other than motor fuel and special fuel is taxable as provided in this part, with the exception of fuel expressly exempt herein. However, diesel fuel and kerosene used in any tractor, vehicle, or other farm equipment which is used exclusively on a farm or for processing farm products on the farm are taxable as provided in part II. Motor fuels and special fuels are taxable as provided in part II, with the exception of those motor fuels and special fuels used by railroad locomotives or vessels to transport persons or property in interstate or foreign commerce which are taxable under this part only to the extent provided herein. The basis of the tax shall be the ratio of intrastate mileage to interstate or foreign mileage traveled by the carrier during the previous fiscal year of the carrier, such ratio to be determined at the close of the fiscal year of the carrier. This ratio shall be applied each month

to the total purchases made in this state of gasoline and other fuels to establish that portion of the total used and consumed in intrastate movement and subject to tax under this chapter.

(b) Alcoholic beverages and malt beverages are not exempt. The terms "alcoholic beverages" and "malt beverages" as used in this paragraph have the same meanings ascribed to them in ss. 561.01(4) and 563.01, respectively. It is determined by the Legislature that the classification of alcoholic beverages made in this paragraph for the purpose of extending the tax imposed by this chapter is reasonable and just; and it is intended that such tax be separate from, and in addition to, any other tax imposed on alcoholic beverages.

APPENDIX K

Air Transport Services Agreement dated
September 22, 1977 between the
United States of America
and Argentina

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29 U.S.T. 2795, T.I.A.S. No. 8978

F. Business Conditions: The civil aeronautics authorities of each country shall endeavor to ensure that the designated airlines of each country will be able to operate at maximum efficiency. In particular, efforts will be made to provide: 1) for ease and promptness of conversion and remittance; 2) for navigation and communication charges and fuel prices at the lowest practicable levels; 3) for exemption from taxes; and 4) for unrestricted advertising of airlines' services.

* * * *

Extension and Amendment:

March 11, 1981

T.I.A.S. No. 10440

September 9, 1983 and October 13, 1983

Air Transport Services Agreement dated
June 23, 1982 between the
United States of America
and Brazil

IX. BUSINESS CONDITIONS AND COMMERCIAL OPPORTUNITIES

The authorities of each country shall make all possible efforts to ensure that the airlines of each country can operate at maximum efficiency with a fair and equal opportunity to compete for traffic on a non-discriminatory basis. In particular, each government will provide for: 1) fair and equal opportunity to carry commercial traffic without discrimination among airlines; 2) simple procedures for prompt conversion and remittance of currency; 3) airport and airways charges and fuel charges on a non-discriminatory basis; 4) exemption from federal taxes to the maximum extent possible; 5) unrestricted opportunities for advertising and other promotion of all of the services of the designated airlines, and 6) the opportunity for airlines to provide ground handling services for themselves or to contract with a company of their choice for the provision of those services in accordance with national legal requirements.

Extension:

April 20, 1983 and May 2, 1983

Amendment:

June 15, 1984

VII. Business Conditions and Commercial Opportunities

Each Party affirmed its commitment to make all possible efforts to ensure that the airlines of each country can operate at the maximum efficiency with a fair and

equal opportunity to compete for traffic on a non-discriminatory basis. In particular, each government will provide for: 1) fair and equal opportunity to carry commercial traffic without discrimination among airlines; 2) simple procedures for prompt conversion and remittance of currency; 3) airport and airways charges and fuel charges on a non-discriminatory basis; 4) exemption from federal taxes to the maximum extent possible; 5) unrestricted opportunities for advertising and other promotion of all of the services of the airlines; and 6) the opportunity for airlines to provide ground handling services for themselves or to contract with a company of their choice for the provision of those services in accordance with national legal requirements. In addition, the delegations agreed that a designated airline of either Party may notify directly the aeronautical authorities of the other Party of any problems which the airline has encountered regarding discrimination or unfair practices; such notification shall impose an obligation on the aeronautical authorities of that Party to investigate fully such allegations and, if considered substantiated, the aeronautical authorities shall immediately take steps to eliminate the discrimination of unfair practices complained of.

VIII. Fuel Purchases

The delegations of both countries stated that the designated airlines of both countries may purchase local services and fuel in local currency or in freely convertible currencies at the option of the airline. The Brazilian delegation stated that studies are being conducted with a goal of eliminating all additional charges which may occur in the processing of payments for these local services and fuel.

Air Transport Services Agreement dated
October 24, 1956 between the
United States of America
and Colombia

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14 U.S.T. 429, T.I.A.S. No. 5338

ARTICLE 7

In order to prevent discriminatory practices and to assure equality of treatment, both contracting parties agree that:

* * * *

(B) Fuel, lubricating oils, consumable technical supplies, spare parts, regular equipment, and stores introduced into the territory of one contracting party by the other contracting party or its nationals, and intended solely for use by aircraft of such contracting party shall be exempt on a basis of reciprocity from customs duties, inspection fees and other national duties or charges.

(C) Fuel, lubricating oils, consumable technical supplies, spare parts, regular equipment, and stores retained on board aircraft of the airlines of one contracting party authorized to operate the routes and services provided for in this Agreement shall, upon arriving in or leaving the territory of the other contracting party, be exempt on a basis of reciprocity from customs duties, inspection fees and other national duties or charges, even though such supplies be used or consumed by such air craft on flights in that territory.

(D) Fuel, lubricating oils, consumable technical supplies, spare parts, regular equipment, and stores taken on board aircraft of the airlines of one contracting party in the territory of the other and used in international services shall be exempt on a basis of reciprocity from

customs duties, excise taxes, inspection fees and other national duties or charges.

Amendment:

October 23, 1968
19 U.S.T. 7501, T:I.A.S. No. 6593

October 16, 1981 and October 22, 1981
T.I.A.S. No. 10404

Air Transport Services Agreement dated
October 20, 1983 and November 23, 1983
between the United States of America
and Costa Rica

ARTICLE 9

Customs Duties and Taxes

(1) On arriving in the territory of one Party, aircraft operated in international air transportation by the designated airlines of the other Party, their regular equipment, ground equipment, fuel, lubricants, consumable technical supplies, spare parts, including engines, aircraft stores (including but not limited to such items as food, beverages and liquor, tobacco and other products destined for sale to or use by pasengers in limited quantities during the flight), and other items intended for or used solely in connection with the operation or servicing of aircraft engaged in international air transportation shall be exempt, on the basis of reciprocity, from all import restrictions, property taxes and capital levies, customs duties, excise taxes, and similar fees and charges imposed by the national authorities, and not based on the cost of services provided, provided such equipment and supplies remain on board the aircraft.

(2) There shall also be exempt, on the basis of reciprocity, from the taxes, duties, fees and charges referred to in paragraph (1) of this Article, with the exception of charges based on the cost of the service provided:

(a) aircraft stores introduced into or supplied in the territory of a Party and taken on board, within reasonable limits, for use on outbound aircraft of a designated airline of the other Party engaged in international air transportation, even when these stores are to be used on a part of the journey performed over the territory of the Party in which they are taken on board;

(b) ground equipment and spare parts including engines introduced into the territory of a Party for the servicing, maintenance or repair of aircraft of a designated airline of the other Party used in international air transportation; and

(c) fuel, lubricants and consumable technical supplies introduced into or supplied in the territory of a Party for use in an aircraft of a designated airline of the other Party engaged in international air transportation, even when these supplies are to be used on a part of the journey performed over the territory of the Party in which they are taken on board.

(3) Equipment and supplies referred to in paragraphs (1) and (2) of this Article may be required to be kept under the supervision or control of the appropriate authorities.

(4) The exemptions provided for by this Article shall also be available where the designated airlines of one Party have contracted with another airline, which similarly enjoys such exemptions from the other Party, for the loan or transfer in the territory of the other Party of the items specified in paragraphs (1) and (2) of this Article.

(5) Each Party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on the items specified in paragraphs (1) and (2) of this Article, as well as from fuel through-put charges, in the circumstances described in this Article, except to the extent that the charges are based on the actual cost of providing the service.

Air Transport Services Agreement dated
January 8, 1947 between the
United States of America
and Ecuador

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61 Stat. 2773, T.I.A.S. No. 1606

ARTICLE 3

In order to prevent discriminatory practices and to assure equality of treatment, both contracting parties agree that:

* * * *

(b) Fuel, lubricating oils, and spare parts introduced into the territory of one contracting party by the other contracting party or its nationals, and intended solely for use by aircraft of the airlines of such contracting party shall, with respect to the imposition of customs duties, inspection fees or other national duties or charges by the contracting party whose territory is entered, be accorded the same treatment as that applying to national airlines and to airlines of the most-favored-nation.

(c) The fuel, lubricating oils, spare parts, regular equipment and aircraft stores retained on board civil aircraft of the airlines of one contracting party authorized to operate the routes and services described in the Annex shall, upon arriving in or leaving the territory of the other contracting party, be exempt from customs, inspection fees or similar duties or charges, even though such supplies be used or consumed by such aircraft on flights in that territory.

Amendment:

January 3, 1951 and January 10, 1951
2 U.S.T. 482, T.I.A.S. No. 2196

Supplement:

December 31, 1975
T.I.A.S. No. 8205

Air Transport Services Agreement dated
August 15, 1960 between the
United States of America
and Mexico

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12 U.S.T. 60, T.I.A.S. No. 4675

ARTICLE 7

In order to prevent discriminatory practices and to assure equality of treatment, both parties agree further to observe the following principles:

* * * *

(b) Fuel, lubricating oils, consumable technical supplies, spare parts, regular equipment, and stores introduced into the territory of one party by the other party or its nationals, and intended solely for use by aircraft of such party shall be exempt on a basis of reciprocity from custom duties, inspection fees and other national duties or charges.

(c) Fuel, lubricating oils, other consumable technical supplies, spare parts, regular equipment, and stores retained on board aircraft of the airlines of one party authorized to operate the routes and services provided for in this Agreement shall, upon arriving in or leaving the territory of the other party, be exempt on a basis of reciprocity from customs duties, inspection fees and other national duties or charges, even though such supplies be used or consumed by such aircraft on flights in that territory.

(d) Fuel, lubricating oils, other consumable technical supplies, spare parts, regular equipment, and stores taken on board aircraft of the airlines of one party in the territory of the other and use in international services shall be exempt on a basis of reciprocity from customs duties,

excise taxes, inspection fees and other national duties or charges.

Extension and Amendment:

July 31, 1970
22 U.S.T. 1492, T.I.A.S. No. 7167

January 20, 1978
Department of State Press Release No. 63,
February 7, 1978

December 13, 1983 and December 16, 1983

Air Transport Services Agreement dated
February 11, 1946 between the
United States of America
and the United Kingdom

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60 Stat. 1499, T.I.A.S. No. 1507

ARTICLE 3

* * * *

(2) Fuel, lubricating oils and spare parts introduced into, or taken on board aircraft in, the territory of one Contracting Party by, or on behalf of, a designated air carrier of the other Contracting Party and intended solely for use by the aircraft of such carrier shall be accorded, with respect to customs duties, inspection fees or other charges imposed by the former Contracting Party, treatment not less favourable than that granted to national air carriers engaged in international air services or such carriers of the most favoured nation.

(3) Supplies of fuel, lubricating oils, spare parts, regular equipment and aircraft stores retained on board aircraft of a designated air carrier of one Contracting Party shall be exempt in the territory of the other Contracting Party from customs duties, inspection fees or similar duties or charges, even though such supplies be used by such aircraft on flights within that territory.

Agreement dated November 22, 1961 between the United States of America and the United Kingdom providing for air routes between the West Indies and the United States, operations over which will be in accordance

with the provisions of the agreement of February 11, 1946

13 U.S.T. 171, T.I.A.S. No. 4955

Agreement dated September 22, 1962 and October 8, 1962 between the United States of America and Trinidad and Tobago to continue application of certain agreements to scheduled services between the United States and the Caribbean area by United States and Trinidad and Tobago Airlines

13 U.S.T. 2463, T.I.A.S. No. 5209

APPENDIX L

Letter dated September 29, 1982 to Executive Director of State of Florida Department of Revenue from Deputy Assistant Secretary of State for Transportation and Telecommunications

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[SEAL]

United States Department of State
Washington, D.C. 20520
September 29, 1982

Mr. Randy Miller
Director
Department of Revenue
102 Carlton Building
Calhoun Street
Talahassee, Florida 32301

Dear Mr. Miller:

The Department of State is seeking your cooperation in an important matter affecting U.S. international relations.

The U.S. Government exempts foreign airlines from customs duties, taxes, fees and other national charges on their aircraft, fuel, and aviation related materials. These exemptions include such items as lubricants, consumable technical supplies, spare parts (including engines) and aircraft stores (including food, beverages and tobacco). The United States obligation to accord these exemptions stems from our adherence to Article 24 of the International Convention on Civil Aviation (Chicago, 1944) and to the air transport agreements which the United States has with over 70 foreign countries. In some cases, such as the absence of a bilateral aviation agreement, exemptions are accorded foreign airlines pursuant to a finding of reciprocity.

Governments of a number of countries have recently brought to our attention that their airlines are required to pay state and local taxes on items for which the U.S. Government grants an exemption from federal taxes. Some foreign governments have questioned the appropriateness of imposing these state and local taxes on foreign air carriers in view of the generally-accepted and long-standing international practice of reciprocally exempting such items from taxes. A few such governments have raised the possibility that state and local authorities in their jurisdictions could impose similar taxes on U.S. airlines. A proliferation of state and local taxes would frustrate the international system of reciprocal tax exemptions and thereby significantly increase the cost of international air transportation.

We urge, therefore, that you exempt foreign air carriers from taxes levied in your jurisdiction on items for which the U.S. Government provides an exemption. To ensure that U.S. airlines enjoy reciprocal treatment abroad, we recommend that you grant such exemptions only to foreign airlines which demonstrate that state and local authorities in their country exempt U.S. airlines from taxes.

In order to respond to foreign government inquiries, we would appreciate knowing precisely what state and local charges you currently levy on foreign airlines. Such information would be particularly helpful if you would indicate whether the charges are indeed taxes or whether they are fees for services rendered. Information concerning actual and proposed exemptions for foreign airlines would also be useful.

We appreciate your assistance and cooperation in this matter.

Sincerely,

MATTHEW V. SCOCOZZA
Deputy Assistant Secretary
for Transportation and
Telecommunication

cc: Mr. Grover C. Jones
Chief, Bureau of Aviation
Florida Dept. of Transportation
605 Suwannee St.
Mail Station 46
Talahassee, Florida 32301

Mr. Richard Judy
Director
Miami International Airport
Box 59-2075, AMF
Miami, Florida

Letter dated October 25, 1982 to
Deputy Assistant Secretary of State for
Transportation and Telecommunications
from Executive Director of State of
Florida Department of Revenue

STATE OF FLORIDA
DEPARTMENT OF REVENUE
Tallahassee, 32301

[SEAL]

Randy Miller
Executive Director

October 25, 1982

Mr. Matthew V. Scocozza
Deputy Assistant Secretary
for Transportation and Telecommunication
United States Department of State
Washington, D. C. 20520

Dear Mr. Scocozza:

This will answer your letter of September 29 regarding taxation of foreign airlines.

The State of Florida recognized the importance of foreign airlines (and steamships) many years ago, and in spite of increased tax rates and bases over the years, the generous tax advantages allowed them have not changed.

Examples of these tax advantages are:

1. They are totally exempt from the state 8¢ motor fuel tax (the same as domestic commercial airlines) on all fuel placed aboard the aircraft.

2. The state's sales and use tax applies only to the ratio of miles flown in Florida to total system

miles. The very short distance out of Miami, Ft. Lauderdale, Tampa and Jacksonville is so minute, and since we must recognize any tax properly imposed by another state or taxing jurisdiction, the result is that practically no Florida sales and use tax is realized from foreign carriers on their purchases of aircraft, parts, fuel, certain ground and loading equipment, etc.

This letter relates to state imposed taxes only. Any taxes and/or fees imposed by local taxing authorities are something we have very little knowledge of and no control over.

We are taking the liberty of forwarding a copy of your letter to Governor Bob Graham for review by his policy issue staff, and if there is some particular issue not covered in this response, please let us hear from you again.

Sincerely,

/s/ Randy Miller
RANDY MILLER
Executive Director

RM/vam

cc: Honorable Bob Graham
Mr. Grover C. Jones
Mr. Richard Judy

Letter dated March 17, 1982 [1983] to
Executive Director of State of Florida
Department of Revenue from
Deputy Assistant Secretary of State for
Transportation and Telecommunications

[SEAL]

DEPARTMENT OF STATE
Washington, D.C. 20520

Mr. Randy Miller
Executive Director
Department of Revenue
State of Florida
Tallahassee, Fla. 23201

March 17, 1982

Dear Mr. Miller:

I am writing to you to express the Department of State's concern regarding the recent enactment of a state tax on aviation fuel. In your letter to me of October 25, 1982, you indicated that the State of Florida ". . . recognized the importance of foreign airlines many years ago . . . and that the generous tax advantages allowed them have not changed."

Therefore, we were surprised and distressed to hear that the State of Florida plans to impose a 5% tax on aviation fuel, effective April 1, 1983. I understand the tax is to be applied to all aviation fuel sold and not only to fuel consumed in Florida, as had previously been the case. If imposed, this tax will cause serious foreign relations problems unless provision is made to exclude foreign airlines. It may be possible, for example, to provide for an exemption based on reciprocity whereby foreign airlines would be exempted from the tax if U.S. airlines operating to the foreign airline's home country are also exempted from similar taxes.

We would appreciate any further information you can give us concerning this new tax and for your comments on my suggestion to avoid the foreign relations difficulties.

Sincerely,

/s/ Matthew V. Scocozza
MATTHEW V. SCOCOZZA
Deputy Assistant Secretary
for Transportation and
Telecommunication

Letter of August 30, 1983 to Clerk of Florida Supreme Court transmitting Motion of Appellees to Supplement Record and Appellee's Post-Argument Exhibit A

SQUIRE, SANDERS & DEMPSEY
Cleveland

August 30, 1983

(216) 687-8585

Hon. Sid J. White
Clerk
Supreme Court of Florida
Tallahassee, Florida 32301

Re: Department of Revenue v.
Lineas Aereas Costarricenses, S.A., et al.
Case No. 63,989

Dear Mr. White:

After today's argument, I learned that the Department of State had been expecting me to bring the Department's latest message to the attention of the Court.

To that end, I enclose the original and several copies of a Motion to Supplement the Record; I trust you will find the Motion in order for filing.

Also enclosed, as "Appellees' Post-Argument Exhibit A" are copies of the wire Mr. Papkin and I received this morning from the Department of State. I assume the wire should be lodged with your office pending the Court's ruling on the Motion to Supplement.

Very truly yours,

/s/ D.A.N.
DAVID A. NELSON

IN THE SUPREME COURT OF FLORIDA

Case No. 63,989

DEPARTMENT OF REVENUE,
Appellant, Cross-Appellee,

vs.

LINEAS AEREAS COSTARRICENSES, S.A., *et al.*,
Appellees, Cross-Appellants.

MOTION OF APPELLEES TO SUPPLEMENT RECORD

Appellees ("the Foreign Airlines") respectfully move the Court, pursuant to Rules 9.200(f) and 9.300 of the Florida Rules of Appellate Procedure, for leave to supplement the record by filing with the Court a telegram (copies of which, marked Appellees' Post-Argument Exhibit A, have been lodged with the Clerk) dated August 30, 1983, to Squire, Sanders & Dempsey from Hon. Matthew V. Scocozza, Deputy Assistant Secretary of State for Transportation and Telecommunications, United States Department of State.

In support of this Motion, Appellees would show this Court the following:

1. The telegram amplifies two previous letters from Mr. Scocozza that were received in evidence as part of Plaintiffs' Exhibit 6 (R 373-74) and comprise part of the record on appeal. (Copies of the earlier letters are attached). The telegram is written "on behalf of the aviation authorities of the United States"—the Civil Aeronautics Board and the Department of Transportation, as well as the Department of State—and further illuminates the national policy alluded to in the briefs and oral argument.

2. "The views of the State Department carry substantial weight in these matters. . . ." *United States v. Postal*, 589 F.2d 862, 883 (5th Cir. 1979). While the form in which the Department has presented its views here may be somewhat unorthodox, appellees urge this Court to let the Department's communication be received for whatever it may be worth.

Respectfully submitted,

SQUIRE, SANDERS & DEMPSEY
Attorneys for Appellees/Cross-Appellants

By _____

DAVID A. NELSON
One Biscayne Tower
Two South Biscayne Boulevard
Suite 3684
Miami, Florida 33131
(305) 577-8700

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Motion has been delivered to the office of Joseph C. Mellichamp, III, Assistant Attorney General, Department of Legal Affairs, LL04, the Capitol, Tallahassee, Florida, and the office of Larry Levy, General Counsel, Department of Revenue, State of Florida, 203 Carlton Building, Tallahassee, Florida 32301, and has been mailed to James E. Tribble, Blackwell, Walker, Gray, Powers, Flick & Hoehl, 2400 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida 33131, this 30th day of August, 1983.

DAVID A. NELSON
Attorney for Appellees/Cross-Appellants

Appellees' Post-Argument Exhibit A—Telegram dated August 30, 1983 from Deputy Assistant Secretary of State for Transportation and Telecommunications to Squire, Sanders & Dempsey

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[LOGO] TELEGRAM
WESTERN UNION

THA007(0805)(4-002043M242)PD 08/30/83 0801
ICS IFLDOSA WSH
2403 UG WASHDC
PMS SQUIRE, SANDERS AND DEMPSEY (URGENT DELIVERY REQUESTED)
C/O TALLAHASSEE HILTON
101 SOUTH ADAMS STREET
TALLAHASSEE FLA 32302

ATTN: SQUIRE SANDERS AND DEMPSEY, MR. ROBERT PAPKIN

DEAR MR. PAPKIN:

I AM WRITING ON BEHALF OF THE AVIATION AUTHORITIES OF THE UNITED STATES—THE DEPARTMENT OF STATE, THE CIVIL AERONAUTICS BOARD AND THE DEPARTMENT OF TRANSPORTATION—WITH RESPECT TO THE APPEAL IN STATE OF FLORIDA, DEPARTMENT OF REVENUE V. LINEAS AEREAS COSTARRICENSES, S.A., ET AL., CASE NO. 63,989, WHICH I UNDERSTAND IS PENDING BEFORE THE SUPREME COURT OF THE STATE OF FLORIDA. AS YOU WILL BE AWARE FROM THE RECORD OF THE APPEAL, I HAVE TWICE WRITTEN TO THE DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA TO EXPLAIN HOW THE POLICIES AND INTERESTS OF

THE UNITED STATES ARE AFFECTED BY STATE AND LOCAL TAXATION OF INTERNATIONAL AIR CARRIERS. THOSE LETTERS HAVE BEEN INTRODUCED INTO THE RECORD OF THIS PROCEEDING AND WERE RELIED UPON IN THE TRIAL COURT S FINAL JUDGMENT (AS AMENDED). THE POSITIONS EXPRESSED IN THOSE LETTERS CONTINUE TO REFLECT THE POLICIES OF THE U.S. AVIATION

THE UNITED STATES IS COMMITTED—BY STATUTE, INTERNATIONAL AGREEMENT AND EXPRESS POLICY—TO A MARKETPLACE FOR INTERNATIONAL AVIATION GOVERNED, TO THE GREATEST EXTENT POSSIBLE, BY COMPETITIVE FORCES UNALTERED BY GOVERNMENTAL INTERVENTION. FOREIGN TAXATION OF AIR CARRIERS THREATENS AN EXCESSIVE TAX BURDEN ON INTERNATIONAL TRANSPORTATION AND RESTRICTED ACCESS TO THE MARKETPLACE; IT MAY ALSO UNDERMINE THE EVENHANDEDNESS REQUISITE TO FAIR COMPETITION IN THE MARKETPLACE. THEREFORE, THE FEDERAL GOVERNMENT HAS PARTICIPATED IN AND IS CONTINUING TO ENCOURAGE A GROWING INTERNATIONAL CONSENSUS TO PROMOTE INTERNATIONAL AIR SERVICES THROUGH RECIPROCAL EXEMPTION OF AIR CARRIERS FROM FOREIGN TAXES. AS PART OF THIS POLICY, THE U.S. ENCOURAGES THE STATES TO EXEMPT FOREIGN AIR CARRIERS FROM ALL TAXES, IN PARTICULAR TO AVOID RETALIATION BY FOREIGN GOVERNMENTS AGAINST ALL U.S. CARRIERS IN RESPONSE TO THE TAX POLICY OF ONLY ONE STATE. SENATE BILL NO. 8-A CONFLICTS WITH THIS FEDERAL POLICY AND THE LONG-ACCEPTED INTERNATIONAL PRACTICE IT REFLECTS.

FURTHER, AS I UNDERSTAND SENATE BILL NO. 8-A, IT IS SPECIFICALLY INTENDED TO PROVIDE A COMPETITIVE ADVANTAGE TO QUALIFIED U.S. AIR CARRIERS DOMICILED IN THE STATE OF FLORIDA. IN OUR VIEW, THIS OBJECTIVE IS INCONSISTENT WITH THE POLICY REFLECTED IN ALL RELEVANT BILATERAL CIVIL AVIATION AGREEMENTS TO PROVIDE A "FAIR AND EQUAL OPPORTUNITY TO COMPETE."

VERY TRULY YOURS,

MATTHEW V. SCOCOZZA
DEPUTY ASSISTANT SECRETARY FOR
TRANSPORTATION AND TELECOMMUNICATIONS
DEPARTMENT OF STATE WASHINGTON DC 246266

IN THE SUPREME COURT OF FLORIDA

Case No. 63,989

DEPARTMENT OF REVENUE,
Appellant, Cross-Appellee,

vs.

LINEAS AEREAS COSTARRICENSES, S.A., *et al.*,
Appellees, Cross-Appellants.

RESPONSE AND MOTION TO STRIKE

Comes now the Appellant, DEPARTMENT OF REVENUE, in response to the Motion of Appellees to Supplement Record and says:

MOTION TO STRIKE

Appellant moves to Strike said Motion for the following reasons:

1. Said motion and the telegram is a *blatant* and *flagrant* violation of the integrity of this Court and the appellate process. The Appellees are attempting to introduce hearsay of the "rankest kind". The telegram is obviously an attempt by the Appellees to "bloat" the record with no opportunity whatsoever for cross examination by the Appellant. The "timing" of this telegram demonstrates quite clearly that the faceless federal bureaucrat offering same was "prompted", probably by Appellees. The motive of the writer and the circumstances which gave rise to such telegram at this precise moment in time cannot be inquired into, which reason alone is sufficient to grant the Motion to Strike.

2. As the Court will recall, Mr. David A. Nelson, Counsel for the Appellees, attempted to discuss this telegram with the Court at the conclusion of his presentation by referring to it as a "procedural" matter. The Court did not accept the telegram then and it should certainly not accept it now. Mr. Nelson is attempting to accomplish indirectly that which he could not accomplish directly; which is to place a telegram signed by an individual federal bureaucrat in the State Department in this Court and suggest by implication to this Court that such is the view of the United States Government, even though the United States has not chosen to petition this Court or the lower Courts for permission to appear either as an Intervenor or as an Amicus.

3. The rule which has existed in this Court, and in all judicial tribunals (presumably even in the jurisdiction where Mr. David A. Nelson practices law) is that evidence may not be submitted at the appellate level and an appellate court may not consider evidentiary matters not presented and made a part of the record at the trial level. The testimony found in such telegram, and, in fact, the Motion itself, is frivolous, scandalous, and impertinent, prejudicing both the Department and this Court by denying the right of cross examination of this Washington faceless federal bureaucrat.

ACCORDINGLY, the Motion should be stricken and attorney's fees should be awarded to the Appellant.

RESPONSE

1. The Appellant readopts all statements contained in its Motion to Strike previously stated herein.

2. It should be noted that the telegram is written to Mr. Papkin who was present with Mr. Nelson in the Courtroom during oral argument Tuesday, August 30, 1983. It is *not* a petition filed with the Court on behalf of the Secretary of State as Mr. Nelson indicated during oral argument, and as he infers in his Motion.

Furthermore, the telegram is a *reiteration* of exactly what Mr. Nelson has argued in his brief. (Appropriate cross examination might well reveal some input and assistance from the Appellees or counsel for same in the wording and preparation, not to mention *timing*, of said telegram).

4. The wording of the telegram indicates quite clearly that Matthew V. Scocozza, the "apparent" author, is relying on an "understanding" of Senate Bill 8-A provided to him from someone else, presumably Mr. Papkin or someone representing the Appellees. He states therein:

> "Further, as I understand Senate Bill No. 8-A, it is specifically intended to provide a competitive advantage to qualified U.S. Air Carriers domiciled in the State of Florida. In our view, this objective is inconsistent with the policy reflected in all relevant bilateral civil aviation agreements to provide a "fair and equal opportunity to compete."

As pointed out in the Appellant's briefs, no competitive advantage exists because both foreign airlines and domestic airlines competing over the same routes would pay the identical tax on the purchase of special fuel purchased in the State of Florida. Domestic airlines, which are required to pay corporate income tax (no foreign airline pays or ever has paid Florida corporate income tax—see Record in this case and the *Air Jamaica* case) and both the foreign and domestic airlines pay the identical special fuel tax varying only because of the number of gallons purchased.

Since no right of cross examination exists, one can only *ponder* what Mr. Scocozza's answer would be if presented with the accurate facts. This is precisely the reason for the rule that evidence and testimony not considered by the trial court cannot be considered by the appellate court.

In fact, under Judge Willis' ruling, it is the foreign airlines competing with the United States airlines over the same routes which would have the competitive advantage and be exempt from the state excise tax, but perhaps that is what Mr. Scocozza actually seeks.

WHEREFORE, the Appellant moves the Court to enter an Order striking the Motion and the telegram and awarding attorney's fees to the Appellant.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Response and Motion to Strike has been sent by U.S. Mail to David A. Nelson, One Biscayne Tower, Two South Biscayne Boulevard, Suite 3684, Miami, Florida 33131; to James E. Tribble, Blackwell, Walker, Gray, Powers, Flick & Hoehl, 2400 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida 33131, this 1st day of September, 1983.

Respectfully submitted,

JIM SMITH
Attorney General

/s/ J. C. Mellichamp, III
JOSEPH C. MELLICHAMP, III
Assistant Attorney General
Department of Legal Affairs
LL04 The Capitol
Tallahassee, Florida 32301
(904) 487-2142

/s/ Larry Levy
LARRY LEVY
General Counsel
Department of Revenue
203 Carlton Building
Tallahassee, Florida 32301
(904) 488-0712

Letter dated September 7, 1983 to Clerk, Florida Supreme Court transmitting ribbon copy of letter dated August 30, 1983 from Deputy Assistant Secretary of State for Transportation and Telecommunications to counsel for State, the Appellees, and the Amicus

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SQUIRE, SANDERS & DEMPSEY
Cleveland

(216) 687-8585

September 7, 1983

VIA EXPRESS MAIL

Hon. Sid J. White
Clerk
Supreme Court of Florida
Tallahassee, Florida 32301

Re: Department of Revenue v. Lineas Aereas Costarricenses, S.A., et al.
Case No. 63,989

Dear Mr. White:

I am now in receipt of the ribbon copy of a letter from the U.S. State Department confirming (and, in minor degree, correcting) the text of the wire lodged with your office at the end of last month. I enclose the original and seven copies herewith, in the thought that they should probably be used in lieu of or in addition to the wire you are now holding if the Court grants the foreign airlines' pending motion to supplement the record.

Very truly yours,

/s/
DAVID A. NELSON

Ribbon copy of letter dated August 20, 1983 from Deputy Assistant Secretary of State for Transportation and Telecommunications to counsel for State, the Appellees, and the Amicus

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[SEAL]

United States Department of State
Washington, D.C. 20520
August 30, 1983

[Filed Sep. 8, 1983]

Mr. Robert Papkin
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Mr. James E. Tribble
Blackwell, Walker, Grey, Powers, Flick & Hoehl
2400 Amerifirst Building
Southeast Third Avenue
Miami, Florida 33131

Mr. Jim Smith, Attorney General
Attn: Joseph Mellichamp, III
Assistant Attorney General
Department of Legal Affairs
The Capitol, 11-04
Tallahassee, Florida 32301

Mr. Larry Levy
General Counsel
Department of Revenue
State of Florida
Carlton Building, Room 203
Tallahassee, Florida 32301

Gentlemen:

I am writing on behalf of the aviation authorities of the United States—the Department of State, the Civil

Aeronautics Board and the Department of Transportation—with respect to the appeal in *State of Florida, Department of Revenue v. Lineas Aereas Costarricenses, S.A., et al.*, Case No. 63,989, which I understand is pending before the Supreme Court of the State of Florida. As you will be aware from the record of the trial, I have twice written to the Department of Revenue of the State of Florida to explain how the policies and interests of the United States are affected by state and local taxation of international air carriers. Those letters have been introduced into the record of this proceeding and were relied upon in the trial court's Final Judgment (as amended). The positions expressed in those letters continue to reflect the policies of the U.S. aviation authorities.

The United States is committed—by statute, international agreement and express policy—to a marketplace for international aviation governed, to the greatest extent possible, by competitive forces unaltered by governmental intervention. Foreign taxation of air carriers threatens an excessive tax burden on international transportation and restricted access to the marketplace; it may also undermine the evenhandedness requisite to fair competition in the marketplace. Therefore, the federal government has participated in and is continuing to encourage a growing international consensus to promote international air services through reciprocal exemption of air carriers from foreign taxes. As part of this policy, the U.S. encourages the States to exempt foreign air carriers from all taxes, in particular to avoid retaliation by foreign governments against all U.S. carriers in response to the tax policy of only one State. Senate Bill No. 8-A conflicts with this federal policy and the long-accepted international practice it reflects.

Further, as I understand Senate Bill No. 8-A, it is specifically intended to provide a competitive advantage to qualified U.S. air carriers domiciled in the State of

Florida. In our view, this objective is inconsistent with the policy reflected in all relevant bilateral civil aviation agreements to provide a "fair and equal opportunity to compete."

Very truly yours,

/s/ Matthew V. Scocozza
MATTHEW V. SCOCOZZA
Deputy Assistant Secretary
for Transportation and
Telecommunications

Letter dated September 8, 1983 from
Clerk, Florida Supreme Court to
Counsel for Appellees

SID J. WHITE, Clerk
SUPREME COURT OF FLORIDA
Supreme Court Building
Tallahassee 32301

September 8, 1983

Case No. 63,989

RE: DEPT OF REVENUE

v.

LINEAS AEREAS COSTARRICENSES, S.A.

David A. Nelson, Esq.
1800 Huntington Building
Cleveland, Ohio 44115

I have this date received the below-listed pleadings or documents:

> The enclosures you attached with your letter of September 7, 1983, are being returned as the Court denied the Motion of Appellees to Supplement Record.

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

/s/ Sid J. White
Clerk
Supreme Court

SJW/pb

cc: Hon. Matthew V. Scocozza
Larry Levy, Esquire
Joseph C. Mellichamp, III, Esquire
James E. Tribble, Esquire

IN THE SUPREME COURT OF FLORIDA

Case No. 63,989

DEPARTMENT OF REVENUE,
Appellant, Cross-Appellee,

vs.

LINEAS AEREAS COSTARRICENSES, S.A., *et al.*,
Appellees, Cross-Appellants.

APPELLEES' BRIEF IN OPPOSITION TO MOTION TO STRIKE

We do not want to make a mountain out of a molehill, but the Department of Revenue's motion to strike clearly merits a response.

The Department appears to be laboring under a misapprehension as to what has actually been filed with this Court. The telegram from the Department of State was *not* attached to appellees' August 31 motion. The text of the telegram was *not* quoted in the motion. (Neither was it quoted in oral argument; on the contrary, as the Court will recall, counsel scrupulously *refrained* from quoting the telegram and noted that it would be improper to read from it without the telegram having been made part of the record.)

All that has been placed before this Court so far—aside from a passage that the Department of Revenue itself has seen fit to quote from the telegram—is a short and straightforward motion asking for leave to supplement the record. If there is any jurisdiction in the land where the mere filing of such a motion is considered

"a . . . violation of the [Court's] integrity," we are unaware of it.

The motion to supplement is perfectly proper from a procedural standpoint; to strike the motion would be absurd. To deny it, we submit, would be wrong.

The notion that we are attempting to bloat the record with "hearsay" simply will not wash. That the U.S. Department of State has a definite view to express on the challenged tax happens to be a fact. The expression of that view no more constitutes "hearsay" than does the expression of the International Air Transport Association's view in the amicus curiae brief this Court has already received from that body.

The existence of the State Department's August 30 telegram is a fact, just as the existence of its earlier letters to the Department of Revenue is a fact. The earlier letters (copies of which, for ease of reference, are attached to the motion to supplement) were offered in evidence at the trial. R 373. The Department of Revenue objected to their admission on grounds of relevance and materiality, but certainly did not claim they were "hearsay." R 374. Judge Willis overruled the objection and allowed the letters to be received. *Id.*

Even if the State Department's letters did constitute hearsay, they would still be admissible as "public records and reports" under Fla. Ev. Code § 90.803(8). The letters are obviously "statements reduced to writing . . . of public offices or agencies," within the meaning of those terms as used in the Evidence Code, and the Department of Revenue can hardly deny that the letters relate to "matters which there was a duty to report . . . ." That duty is imposed, of course, by the bilateral aviation agreements themselves. Under the bilateral agreements, as the Department of Revenue acknowledges, the United States has undertaken to use its best efforts to secure exemption of the foreign airlines from state and local taxes. The

State Department is morally and legally bound to oppose the tax at issue here, and this Court may find, if it chooses to receive the latest communication, that the State Department has in no way shirked its duty.

It is true, of course, that the State Department's telegram was not "presented and made a part of the record at the trial level." It couldn't have been, because it didn't exist then. We would have offered the telegram at the time of trial had we been able to, and surely there can be no doubt that Judge Willis would have admitted the telegram, just as he admitted the State Department's letters. He would have been correct in doing so. A trial is supposed to be a search for truth, after all, and "[w]hatever evidence is offered which will assist in knowing which party speaks the truth of the issues in an action is relevant, and, when to admit it, does not override other formal rules of evidence, it should be received." *McBrayer v. State*, 112 Fla. 415, 150 So. 736, 737 (1933).

The motion to strike should be denied.

Respectfully submitted,

SQUIRE, SANDERS & DEMPSEY

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CERTIFICATE OF SERVICE

True and correct copies of the foregoing Brief in Opposition to Motion to Strike have been sent by U.S. mail to Joseph C. Mellichamp, III, Assistant Attorney General, Department of Legal Affairs, LL04, The Capitol, Tallahassee, Florida; Larry Levy, General Counsel, Department of Revenue, State of Florida, 203 Carlton Building, Tallahassee, Florida 32301; and James E. Tribble, Blackwell, Walker, Gray, Powers, Flock & Hoehl, 2400 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida 33131, this 9th day of September, 1983.

/s/ David A. Nelson
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CLERK

(2)

CASE NO. 84-922

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

LINEAS AEREAS COSTARRICENSES, S.A., ET AL.,

Appellants,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellee.

On Appeal From the Supreme Court
of Florida

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss this appeal or to affirm the decision of the Supreme Court of Florida on the following grounds:

I. This appeal does not present a substantial federal question because all issues raised by the Appellants have been foreclosed by prior decisions of this Court.

II. The decision of the Supreme Court of Florida is consistent with prior decisions of this Court on the involved issues of law, many of which are cited in the Supreme Court's decision, and it is manifest that the questions on which the decision in this cause depends, are so insubstantial as not to need further argument.

STATEMENT

This appeal is from a decision of the Florida Supreme Court upholding the constitutionality of Chapter 83-3, Laws of Florida, except for §61, which involved a Florida corporate tax credit, which is unrelated to the Florida Sales Tax Law, Chapter 212, Florida Statutes. Chapter 83-3, supra, amended Chapter 212, Florida Statutes, which is commonly referred to as the "Sales Tax Law of Florida". The statute, Chapter 212, Florida Statutes, has been construed by the Florida Supreme Court and other Florida appellate courts on numerous occasions, as being an excise tax levied on the privilege of engaging in certain businesses and transactions as provided for in the statute. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950)

Florida Revenue Commission v. Maas Brothers, Inc., 226 So.2d 849 (Fla. 1 DCA 1969); cert. den. 237 So.2d 177; Estate of W. T. Grant Co. v. Lewis, 358 So.2d 76, (Fla. 1 DCA 1978); 370 So.2d 764 (Fla. 1979); Kirk v. Western Contracting Company, 216 So.2d 503 (Fla. 1 DCA 1968), cert. den. 225 So.2d 535; app. dism. 226 So.2d 815; Ryder Truck Rental v. Bryant, 170 So.2d 822 (Fla. 1964); Green v. Panama City Housing Authority, 115 So.2d 560 (Fla. 1959). The decision in this cause merely restates the position of the highest Court of the State of Florida, to the effect that the excise taxes imposed under Chapter 212, Florida Statutes, are imposed on the privilege of engaging in certain businesses, and are levied on the vendor, for the exercise of such privilege.

Motor fuel and special fuel are taxable under Chapters 212, 206, and 207, Florida Statutes. These several statutes generally interface to some extent because

the Legislature has attempted to utilize the same as part of the body of law of the State of Florida to generate taxes for the operation of government and taxes for public transportation. Prior to April 1, 1983, the effective date of Chapter 83-3, supra, motor fuel and special fuel which were not subject to the 8 cents tax imposed by Chapter 206, Florida Statutes, were taxable under the sales tax law, Chapter 212, Florida Statutes, in the following manner. §212.08(4), F.S., exempted motor fuels and special fuels on which a tax was imposed by Chapter 206 or Chapter 207, Florida Statutes. Aircraft was not within the definitions found in Chapters 206 or 207, Florida Statutes, and accordingly paid no tax under either Chapter 207, Florida Statutes, or Part I or Part II of Chapter

206, Florida Statutes. Truckers, as common carriers, did pay tax under Chapter 207, F.S., and paid tax under Chapter 206, F.S., although a credit was allowed on the taxes paid under Chapter 206, F.S., if tax was paid under Chapter 207, F.S. Truck common carriers were allowed to pro-rate tax under Chapter 207, Florida Statutes. See §207.005(2), F.S.

Since the airlines paid no tax under Chapters 206 or 207, F.S., the exemption found in §212.08(4), F.S., exempting purchases of fuels which had been subjected to tax under Chapters 206 and 207, F.S., did not apply to the airlines. However, airlines did receive pro-ration under §212.08(4), F.S.

Airlines generally lease space and the right to use government owned airport facilities in Florida and at one time were required to pay ad valorem real property taxes on such use and occupancy. However, the Legislature in 1980 enacted Chapter 80-368, Laws of Florida, so as to relieve airlines from the burden of having to pay local ad valorem taxes on such leased property used for airline purposes.

Prior to the effective date of Chapter 83-3, supra, vessels and railroads, like aircraft, were allowed to pro-rate the tax by virtue of the provisions found in Chapter 212, Florida Statutes. See §212.08(4), §212.08(8), and §212.08(9), F.S. However, vessels and railroads were

not exempt from the provisions of Part I of Chapter 206, F.S., on purchases of motor fuel, but were exempt as were aircraft from the provisions of Part II of Chapter 206, F.S., and Chapter 207, F.S., both of which contained taxes on such fuel in a specified amount per gallon. Chapter 83-3, supra, removed from the statute, the authority which allowed airlines to pro-rate taxes. Truck line common carriers were required to pay both the taxes imposed under Chapter 206, F.S., and any which may be due under Chapter 207, F.S., and the new tax imposed in Part II of Chapter 212, Florida Statutes, through the enaction of Chapter 83-3, supra. Vessels and railroads continue to receive the pro-ration found in

§212.08(4), F.S., but also continue to be liable for taxes imposed under Part I of Chapter 206, F.S.

Although Appellant argues strenuously that the tax imposed under Chapter 212, Florida Statutes, is a user fee or user tax, this contention was rejected by the Trial Court both factually and legally. Although the Appellee does not agree that such question is a factual issue, and in fact, in another case pending on appeal involving the same statute,[1] no testimony was taken. Even if such were a factual issue, it has been resolved against

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[1] Northeastern Airways, Inc., and Arrow Air, Inc., v. State of Florida, Department of Revenue Case No. 84-929

the evidence and testimony presented by the Appellants, by the Trial Court which is the trier of fact, and affirmed by the Florida Supreme Court.

That part of the Appellants' argument premised on the false assumption that the taxes imposed under Chapter 212, Florida Statutes, are user fees is ill-founded. This is not, and never has been true.

It is significant that all foreign air carriers and all United States air carriers purchasing fuel in the United States were subject to tax in exactly the same manner both and after the enaction of Chapter 83-3, Laws of Florida.

The various international agreements involved in the case at bar contain an article similar to that found in Art. 8 in the agreement between the United States and Colombia, dated October 24, 1956, T.I.A.S. 5338 which states:

> There shall be a fair and equal opportunity for the airlines of each contracting party to operate on any route covered by this Agreement.

The similar provision in the Air Transport Agreement with Costa Rica, found in Art. 11, Memorandum of Understanding, August 17, 1979, U.S. - Costa Rica (unpublished) provides:

> "Fair Competition (1) Each party shall allow a fair and equal opportunity for the designated airlines of both Parties to compete in the international air transportation covered by this Agreement."

In Article VII of the agreement between the United States and Colombia, there is a specific exemption from national excise taxes which provides:

> (D) Fuel, lubricating oils, consumable technical supplies, spare parts, regular equipment, and stores taken on board aircraft of the airlines of one contracting party in the territory of the other and used in international services shall be exempt on a basis of reciprocity from customs duties, excise taxes, inspection fees and other national duties or charges. (e.s.)

No specific exemption is provided in any of the international agreements for state excise taxes such as that imposed under Chapter 212, Florida Statutes, as amended by Chapter 83-3, Laws of Florida.

POINTS I AND II

POINT I. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION BECAUSE ALL ISSUES RAISED BY THE APPELLANT HAVE BEEN FORECLOSED BY PRIOR DECISIONS OF THIS COURT.

POINT II. THE DECISION OF THE SUPREME COURT OF FLORIDA IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT ON THE INVOLVED ISSUES OF LAW, MANY OF WHICH ARE CITED IN THE SUPREME COURT'S DECISION, AND IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION IN THIS CAUSE DEPENDS, ARE SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

A. THE FLORIDA SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISION IN JAPAN LINE LTD. V. COUNTY OF LOS ANGELES. 441. U.S. 434 (1979).

It should be remembered that the exemption sought by foreign airlines is inconsistent with the Articles in the

various agreements which provide that each party shall allow a fair and equal opportunity for the designated airlines of both parties to compete in the international air transportation covered by the agreements. That which is sought by the Appellants destroys competitive equality because it would provide an exemption from state taxation to foreign airlines purchasing fuel in the United States, which such exemption is not permitted to United States domestic airlines purchasing fuel in Florida traveling and competing on the same routes as the foreign airlines. The effect of this is to have Florida and the United States subsidizing foreign airlines in competition with the domestic airlines.

This purpose is totally inconsistent with the terms of the agreements themselves which provide in effect that there shall be a fair and equal opportunity for the airlines of each party to operate on any route listed in the agreement and that the parties shall provide a fair and equal opportunity to compete for traffic on a nondiscriminatory basis. (See Commercial Air Transport Agreement, January 8, 1947, United States-Equador, T.I.A.S. 1606 annex §1A; Air Transport Service Agreement, April 13, 1953, United States-Venezuela, T.I.A.S, 2813, ANNEX §IV.b; Air Transport Agreement, (not dated) United States-Costa Rica, Article XI, and similar provisions found in the other agreements involving the Appellants.) So that which is sought by the

foreign airlines is a competitive advantage, not equality of treatment in competition.

The fair and equal opportunity provisions found in the various agreements speak only to routes and not to taxes. By their terms, these clauses guarantee the fair and equal opportunity to operate over the designated routes. The State Department's official Digest of International Law, 9 Whiteman Digest of International Law, 457-58 (1968) suggests that the goal of these provisions was to avoid subsidization of one airline more than another so that one carrier could give the same service at a lower rate. However, even

assuming that the fair and equal opportunity to operate provisions does relate to taxes, it is obvious that Florida's excise tax levied on the sale of fuel in the State of Florida, is consistent with these international agreement provisions because it taxes foreign airlines and domestic airlines identically. This Court has recognized that the language of a Treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them. Guarantee Trust Co v. United States, 304 U.S. 126 (1938), in Estate of Ghio, 108 P. 516 (Calif. 1910), aff'd; Rocco v. Thompson, 223 U.S. 317 (1912) in which

the Court stated that:

> "Such intent is not to be lightly imputed to the federal government, and that it cannot be allowed to exist except where the language used in a treaty plainly expresses it, or necessarily implies it."

It is of course true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiciton of the State of this nation unless clearly necessary to effectuate the national policy. United States v. Pink, 315 U.S. 203, 230 (1942).

In Hines v. Davidowitz, 312 U.S. 52 (1941), this Court discussed state laws which were conflicting, contrary to, or repugnant to federal law in the context of a state law dealing with regulation of aliens, which it was conceded was a matter

exclusively within the Federal Government's jurisdiction. This Court pointed out, however, that concurrent state laws could not be enacted dealing with the same general subject, but distinguished that fact situation from the situation where the states' sovereign power to tax was involved and stated:

> Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax. And it is also of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans.

312 U.S. at p.58

The footnote found therein is also significant. It provides:

> Express recognition of the breadth of the concurrent taxing power of state and nation is found in Federalist paper No. 32.

With this general understanding of certain provisions found in the agreements and of

the general power of states to tax absent express and clear restriction by the federal government, Appellants' contention that the Supreme Court's decision is inconsistent with Japan Line Ltd. will be considered.

In Japan Line Ltd., this Court set forth two additional requirements to the "four prong" test referred to in Complete Auto Transit v. Brady, 430 U.S. 274 (1977). The first was whether the tax, not withstanding apportionment, creates a substantial risk of international multiple taxation, and second whether the tax prevents the federal government from "speaking with one voice when regulating commercial regulations with foreign governments." The decision of the

Florida Supreme Court is consistent with Japan Line and meets both of the additional tests. First, since the legal incident of the withdrawal from storage for use can occur only once, that legal incident could not be taxed in any foreign country. This situation is totally different from the factual situation before this Court in Japan Line, because in that case, the containers being taxed were taxed because of their physical location in California, even though such physical location was of a temporary nature. The containers were used to transport merchandise and could be compared to vessels used for the transportation of property from a foreign country to the United States. The

containers had entered the United States pursuant to a "Customs Convention on containers" agreement which granted containers temporary admission free of import duties and import taxes and free of import prohibitions and restrictions provided they are used solely in foreign commerce and are subject to re-exportation. The containers were designated "instruments of international traffic". Since the containers were capable of physical relocation, and in fact were physically relocated periodically as instrumentalities transporting property in foreign commerce, such containers could physically be located in some other country, and since the tax imposed was a personal property tax which turned on the

situs of the personal property, it is readily apparent that multiple taxation could easily occur. Thus the tax imposed in Japan Line Ltd. was a state tax on instrumentalities of foreign commerce, which is totally unlike the tax imposed in the case at bar, which is an excise tax imposed on dealers for the privilege of engaging in the business of selling fuel in the United States whose legal incident is on the withdrawal from storage for use. This can only occur once, and that is in the State of Florida. Furthermore, in Japan Line Ltd., it was established that Japan has the right and the power to tax the containers in full, and in fact did tax such containers under the property tax

law in Japan. So, because the legal incident giving rise to the tax was physical situs, multiple taxation in fact did occur.

Appellants' suggestion that a risk of double taxation is sufficient to invalidate the tax simply is not supported by Japan Line Ltd. Furthermore, Appellants' speculation that after the airplane lands in a foreign country, the foreign country may impose a tax on whatever fuel is left in the tanks of the aircraft upon landing is exactly that; pure speculation. Furthermore, the State of Florida does not attempt to tax any fuel retained on board the airlines upon arrival into the State of Florida. Thus, the multiple taxation in fact which existed in Japan Line Ltd. is not present in the case at bar. Thus, the Florida Supreme Court's decision is consistent with this Court's pronouncement in Japan Line Ltd. in this regard.

Japan Line Ltd. was discussed by this Court in Container Corp. of America v.

Franchise Tax Board, 463 U.S. 159 (1983). In discussing Japan Line Ltd., this Court pointed out that in that case California had levied an apportioned, non-discriminatory, ad valorem property tax on cargo containers which were instrumentalities of foreign commerce and which were temporarily located in various ports. This Court pointed out that the same cargo containers were subject to an unapportioned property tax in their home port of Japan. It also recognized that a convention agreement signed by the United States and Japan made clear at least that neither national government could impose a tax on temporarily imported cargo containers whose home port was in the other nation. This Court emphasized that the tax fell on an instrumentality of commerce, which was

temporarily domiciled abroad; that is, the containers themselves. This Court in Container Corp. then stated that " . . . on the basis of the facts in Japan Line, we concluded that the California tax at issue was constitutionally proper . . ."

This Court in Container then distinguished the situation in Container from that in Japan Line by pointing out (1) that it involves a tax on income rather than a tax on property, (2) the reasons for allocation to a single situs that often apply in the case of property taxation carry little force in the case of income taxation; (3) double taxation in the Container Corp. case, although real, was not the "inevitable" result of the California taxing scheme. This Court pointed out that in Japan Line, it had relied strongly on the fact that one taxing jurisdiction claimed

the right to tax the containers in full and another taxing jurisdiction claimed the right to tax the containers in part, which was a combination resulting necesarily in double taxation.

Furthermore, this Court recognized that the terms of the treaties involved in Container Corp. did not include taxing activities of sub-national governmental units such as states, stating:

> Third, None of the tax treaties into which the United States has entered covers the taxing activities of sub-national units such as states.

It pointed out that the Senate had on at least one occasion, in considering a proposed treaty, declined to give its consent to a provision in the treaty so as to include a restriction on state taxation. This is significant because the agreements involved in this case do not cover the

taxing activities of sub-national units such as states. Thus, the Florida Supreme Court's decision is consistent with this Court's decision in Container Corp. because it too recognized that the agreements relied upon as a basis for avoiding state-taxation only spoke to national taxes and not state taxes.

Thus, this Court upheld the imposition of the California income tax distinguishing that situation from the situation involving the property tax on containers involved in Japan Line.

Florida's tax is an excise tax imposed on Florida dealers for the privilege of engaging in the business of selling fuel. This privilege is exercised solely within the State of Florida and applies to all airlines, foreign and domestic, purchasing fuel in the State of Florida. The legal

incidence of levy is the first withdrawal for use, and this can occur only once. Florida is not attempting to tax fuel brought into the United States aboard foreign airlines coming into Florida. Since this legal incident can occur only once, no multiple taxation in fact could exist. This is totally dissimilar from the situation in Japan Line where the containers were subject to both property tax in California and an unapportioned like tax in Japan. Thus, the Florida Supreme Court's decision is consistent with this Court's decisions in Container Corp. and Japan Line.

B. NONE OF THE AIR TRANSPORT INTERNATIONAL AGREEMENTS EXEMPT FOREIGN AIRLINES FROM IMPOSITION OF A STATE EXCISE TAX ON THE PURCHASE OF FUELS IN A STATE OF THE UNITED STATES.

Appellants apparently acknowledge that

none of the agreements provide for the specific exemption which they seek but nevertheless suggest that somehow Florida's excise tax prevents the United States from speaking with one voice. The United States has spoken and has not chosen to exempt foreign airlines from state excise taxes imposed on purchases of fuel in any state in the United States. One reason for this is obvious. The purpose of all of the international agreements is to ensure competitive equality. If the United States had exempted foreign airlines from imposition of state excise taxes, this could mean that the state would still impose taxes on sales of fuel to domestic airlines but could not collect a similar tax on sales to foreign airlines competing with the domestic airlines over the same

routes. This would destroy the competitive equality demanded by the agreements and would leave the United States in the position of subsidizing foreign airlines at the expense of the domestic carriers. Furthermore, prior to April 1, 1983, when Chapter 83-3, Laws of Florida, was enacted, foreign airlines and domestic airlines were required to pay the excise tax imposed on fuel sold in Florida, and such tax was apportioned. If the agreements exempted foreign airlines from the purchases of fuel since the inception, (the 1940's) then why were the foreign airlines paying the tax prior to April 1, 1983?

The Appellants attempt to rewrite the agreements to provide for a specific exemption from state taxation. None of the agreements contain such an exemption so the

statement made by Appellants that the Florida Supreme Court ignored the terms of the agreement is totally without basis. The Florida Supreme Court did not ignore the terms of the agreement and in fact examined same and recognized that no specific exemption from state excise taxes was provided for in such agreements.

By limiting the self-executing provisions pertaining to taxes in the agreements to only national taxes and duties, the Executive Branch has indicated an intent not to invade the state's power to tax (some agreements do not even speak to any taxation). Federal preemption of state taxation should never be implied nor inferred, so the absence of any specific preemption of the state's power to tax would certainly suggest that no intent

existed to invade the state's taxing power. The various agreements generally contain a clause similar to that found in the agreement between the United States and Costa Rica which provides as follows:

> (5) Each party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on the items specified in paragraphs (1) and (2) of this Article, as well as from fuel throughput charges, . . .

Article 9, Memorandum of Understanding, August 17, 1979, U.S. - Costa Rica (unpublished). This clause is obviously non self-executing. It should be compared with Article VII (D) of the Agreement between the United States and Colombia which provides:

> (D) Fuel, lubricating oils, consumable technical supplies, spare parts, regular equipment, and stores

> taken on board aircraft of the airlines of one contracting party in the territory of the other and used in international services shall be exempt on a basis of reciprocity from customs duties, excise taxes, inspection fees, and other national duties or charges. Agreement - U.S. - Colombia, October 24, 1956, T.I.A.S. 5338

The Supreme Court squarely recognized the difference in the substance of these two provisions found in various agreements. The one dealing with the exemption from national excise duties and charges, is self-executing, while the one dealing with exemption from state excise taxes is not.

All of the agreements contain certain language which provides that each party shall allow fair and equal opportunity for the designated airlines of both parties to compete in the international air transportation covered by the agreement. For example, see Air Transport Agreement,

October 20, 1983 and November 23, 1983, United States - Costa Rica, Article III, (unpublished); Agreement U.S. - Colombia, October 24, 1956, T.I.A.S. 5338, Article VIII; Commercial Air Transport Agreement, January 8, 1947, United States - Ecuador, T.I.A.S. 1606 Annex §1A; Air Transport Service Agreement April 13, 1953, United States - Venezuela, T.I.A.S. 2813, Annex §IV.b.; Air Transport Service Agreement, August 15, 1960, United Stats - Mexico, T.I.A.S. 4675, Article VIII; and Air Transport Service Agreement, May 10, 1947, United States - Chile, T.I.A.S. 1905 Annex A.A.

The various clauses providing for a fair and equal opportunity to compete refers to routes and does not specifically address taxes, but even if it did, exemption from taxes on purchase of fuel by

foreign airlines where no such exemption is provided for United States airlines traveling over the same routes, would destroy the purpose of this clause guaranteeing a fair and equal opportunity to compete because it would place the foreign airlines in a position of being subsidized at the expense of the domestic airlines.

Here, the United States has spoken with one voice on the subject of state excise taxes, and recognizing the state's sovereign power to tax, has not preempted such taxing power. The terms of the various agreements are clear to this effect. Any United States action is executory. The language which suggests that the United States would use its best

efforts to secure exemption, falls far short of declaring a national policy of preempting state taxation in the agreements.

The language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them. Guarantee Trust Co. v. United States, 304 U.S. 126 (1938). Clearer executory language and intent could scarcely be found than that found in the various international agreement provisions relied upon by the Appellants. For instance, see:

> The civil aeronautics authorities of each country shall endeavor to ensure . . . efforts will be made to provide . . . exemption from taxes . . . (e.s.)

Air Transport Services Agreement, September 22, 1977, United States-Argentina, T.I.A.S. 8978, Article 2.F.;

> The authorities of each country shall make all possible efforts to ensure ...(e.s.).

Memorandum of Consultation, June 23, 1982; United States-Brazil, Section IX.

This type language is little more than an agreement to attempt to obtain future action from the states. The Florida Supreme Court recognized that the provision in the agreement dealing with national duties and excise taxes applied only to national custom duties and excise taxes and charges. The Florida Supreme Court recognized that the purpose of the agreement was to preserve and promote the con-

tinued development of a system of air transport free from discriminatory practices and to support equal commercial opportunity between the nations. It pointed out that the competitive equality would be destroyed if the United States air carriers had to pay state excise taxes on fuel purchases and the foreign carriers did not. In doing so, the Florida Supreme Court relied upon this Court's decision in Pennsylvania v. Nelson, 350 U.S. 497 (1956) and applied the three-prong test to determine the supremacy of a federal regulatory scheme over the state regulation in the same or similar area. Thus, the Florida Supreme Court's decision is consistent with (1) the language of the various agreements themselves, and (2) this Court's application of the three-prong test in Nelson.

Any examination of federal restriction on state taxing power must be viewed in light of this Court's statement in Hines v. Davidowitz, 312 U.S. 52 (1941). That case discussed the concurrent powers of the state and recognized that the state's power to tax was bottomed on a much broader base than that being considered in Hines. The case at bar is not a situation where federal preemption exists because the agreements themselves recognize the difference between national taxes and state taxes; exemption is provided from national taxes by the terms of the agreement in clear, concise terms, while state excise taxes are discussed in terms of future endeavors, which may or may not come to

pass. An agreement to try to agree is not a contract. The agreement could just as easily have provided that the foreign governments shall use their best efforts to prevent United States aircraft from being hijacked or attacked while on the ground in the foreign country. Such is not a binding contract. The Executive Branch of the Federal Government has spoken differently with regard to national and state taxation. Appellants' are asking this Court to ignore this difference which is tantamount to asking this Court to amend or rewrite the agreements to include such an exemption.

An example of a treaty which does provide exemption from local taxes is found in the case of Republic of Finland v. Town of Pelham, 270 N.Y.S.2d. 661. Article 21 of the treaty in that case provided in

pertinent part:

> "Lands and buildings situated in the territory of either High Contracting Party, of which the other High Contracting Party is the legal or equitable owner and which are used exclusively for governmental purposes by that owner, shall be exempt from taxation of every kind, National, State, Provincial and Municipal, other than assessments levied for services or local public improvements by which the premises are benefited." (49 U.S. Stat. 2675) (e.s.)

Accordingly, the federal questions presented are plainly insubstantial and it is manifest that the questions on which the decision in this cause depends are so insubstantial as not to need further argument.

CONCLUSION

For all of the above and foregoing reasons, the Appellee urges the Court to

grant its Motion to Dismiss the appeal or to affirm the decision of the Supreme Court of Florida, because this appeal does not present a substantial federal question inasmuch as the decision of the Supreme Court of Florida is consistent with prior decisions of this Court, and it is manifest that the questions on which the decision in this Cause depends are so insubstantial as not to need further argument.

Respectfully submitted,

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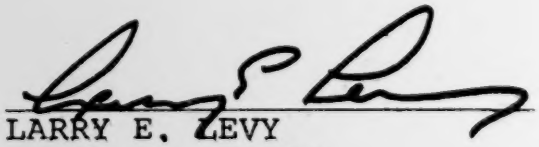
PROOF OF SERVICE

I, LARRY E. LEVY, depose and say that I am Counsel of Record for Appellee, State of Florida, Department of Revenue, and that on February 2, 1985, I served a copy of the foregoing Motion to Dismiss or Affirm on each of the parties required to be served herein as follows:

On Appellant, LINEAS AEREAS COSTARRICENSES, S.A., et al., by mailing copies in duly addressed envelopes, with first class postage prepaid, to Robert D. Papkin and Edward W. Sauer, Squire, Sanders & Dempsey, 1201 Pennsylvania Avenue, N.W., Washington, D.C. 20004.

All parties required to be served have been served.



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No. 84-922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LINEAS AEREAS COSTARRICENSES, S.A., *et al.*,
Appellants,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of the State of Florida

APPELLANTS' REPLY BRIEF

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On Appeal from the Supreme Court of the State of Florida

APPELLANTS' REPLY BRIEF

In accordance with Supreme Court Rule 16.5, Lineas Aereas Costarricenses, S.A. and the other foreign airline appellants in this proceeding[1] ("Foreign Airline Appellants") submit this reply brief in opposition to the motion of the State of Florida to dismiss this appeal or to affirm summarily the judgment of the court below. The Florida Airline Appellants will address only two points made by the State of Florida: (1) that the Florida tax

---

[1] The complete names of all of the Foreign Airline Appellants, and their parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates, were provided in Appendix I to the Jurisdictional Statement.

is no more than a tax on a purely local transaction that does not affect foreign commerce; and (2) that the Florida tax does not prevent the Federal Government from speaking with one voice in its international economic relations.

In its motion, the State of Florida contends that the fuel tax at issue in this case is a purely intrastate matter because it purportedly is imposed upon the withdrawal of fuel from storage within the State of Florida. Accordingly, Florida suggests that the state fuel tax does not have international implications.

Nothing could be farther from the truth. While this case has been pending before this Court, twenty three nations have submitted diplomatic notes to the United States Department of State protesting the Florida fuel tax.[2] The twenty three protesting nations include most of the major aviation trading partners of the United States in virtually every region of the world.

The diplomatic notes unanimously express the serious concern of foreign governments about the Florida tax and the prospect that the uniform international practice of providing reciprocal exemption from tax at all levels of government to international aviation fuel will be eroded if the Florida tax is allowed to stand. For example, the note submitted by the Embassy of Ecuador states:

> The Embassy of Ecuador wishes to inform the Department of State of the grave concern of the Government of Ecuador concerning the imposition of this tax on international air carriers such as Ecua-

---

[2] Diplomatic notes have been submitted by Argentina, Belgium, Brazil, Chile, Colombia, Costa Rica, Ecuador, France, Germany, Honduras, Iceland, Israel, Italy, Japan, Mexico, The Netherlands, Norway (on behalf of itself, Denmark, and Sweden), Spain, Switzerland, Trinidad and Tobago, and the United Kingdom. Counsel to the Foreign Airline Appellants is prepared to lodge copies of all these notes with the Court.

> toriana. It is inappropriate for local jurisdictions such as the State of Florida to impose taxes on fuel used by international air carriers. Under the established practice of nations such fuel purchases are exempt from tax. Consistent with this practice, Ecuador does not impose taxes at the national or local level on fuel used by international air carriers. The Florida tax is inconsistent with this international standard of reciprocity.

Diplomatic Note submitted by the Embassy of Ecuador to the U.S. Department of State (Dec. 14, 1984).

These strong expressions of concern by such a large number of foreign nations confirm that the Florida tax implicates foreign policy issues that must be left to the Federal Government.

In their Jurisdictional Statement, the Foreign Airline Appellants also showed that uniformity in the conduct of the commercial relations of the United States would be impaired if the Florida fuel tax is allowed to stand, and that the Federal Government would be prevented from speaking with one voice in its diplomatic relations. Such a result would be directly contrary to the requirements established by the Court in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). The State of Florida challenges this position, arguing that some of the agreements between the United States and foreign countries regarding aviation do not expressly forbid state fuel taxes and that these agreements are the exclusive expression of the policy of the United States on this issue.

This argument ignores numerous policy expressions of the United States specified in the Jurisdictional Statement. It also ignores the fact that many foreign governments regard the Florida tax as inconsistent with established United States policy. As the Embassy of Iceland pointed out:

> Local taxation of international commerce is inconsistent with, and violates the reciprocity intended by our Agreements and Treaties. Local taxation prevents the Government of the United States from uniformly conducting its relationships with foreign governments. This lack of continuity undermines those relationships.

Diplomatic Note submitted by the Embassy of Iceland to the U.S. Department of State (Dec. 18, 1984).

In their Jurisdictional Statement, the Foreign Airline Appellants also demonstrated the existence of an international consensus, to which the United States subscribes, favoring reciprocal exemption from taxation at all levels of government for international airline fuel. The diplomatic notes confirm this established international practice. As the Embassy of Colombia points out:

> . . . it is totally inappropriate for local jurisdictions to impose taxes upon fuel intended for use by international airlines. For many years there has been an established practice among nations of exempting fuel purchased by international airlines from tax. This practice is demonstrated in Article 24 of the Convention on International Civil Aviation and resolutions on this subject adopted by the Council of the International Civil Aviation Organization on November 14, 1966. This policy has played an important role in the healthy growth of international aviation by preventing an inappropriate financial burden on airlines and their customers.

Diplomatic Note submitted by the Embassy of Colombia to the U.S. Department of State (Dec. 7, 1984).

The diplomatic notes observe that the Florida fuel tax violates this practice and creates the distinct possibility of retaliatory taxation of international airline fuel. Many of the diplomatic notes specifically state that exemptions are granted to United States carriers by foreign nations

with the expectation that reciprocal exemptions will be granted in the United States. Other notes indicate the actions foreign governments are likely to consider taking if the Florida tax is upheld. For example, the Embassy of Colombia states that:

> . . . the example of Florida could set a precedent to be followed by other governments. If the United States allows its states to impose taxes upon fuel purchased by international airlines, the airlines of the United States could very soon see the initiation of local or national taxes by other nations. The development of such a pattern would surely be detrimental to the interests of all concerned and harmful to the development of aviation.

Id.

In a similar vein, the Government of the Republic of Trinidad and Tobago states that it:

> . . . believes that true reciprocity on the part of the United States requires air carrier tax exemptions at both the federal and local levels. The failure of the United States to ensure such complete exemptions may be considered a failure of reciprocity under applicable bilateral agreements, and could moreover constitute a precedent for similar action by other foreign governments.

Diplomatic Note submitted by the Embassy of Trinidad and Tobago to the U.S. Department of State (Dec. 10, 1984).

These diplomatic communications make it clear that there is a genuine danger of retaliatory taxation against United States aviation if the states are allowed to impose taxes on aviation fuel used by international airlines. The Foreign Airline Appellants submit that the expressions of concern and opposition to the Florida tax submitted by twenty-three foreign nations are the clearest possible indication that Florida has intruded where federal uniformity is essential if the Federal Government is to be able effectively to conduct the foreign relations of the

United States in the delicate area of international aviation.

In short, the arguments of the State of Florida that the Florida fuel tax is simply an excise on a domestic transaction which does not affect foreign commerce, and that the Florida fuel tax does not impair the ability of the United States to speak with one voice in its foreign relations are without merit. The Foreign Airline Appellants submit that this tax does have serious practical effects on foreign commerce. Additionally, this tax impairs the ability of the Federal Government to conduct the foreign relations of the United States and creates a serious risk of injury to this country's international aviation relationships. This is precisely the type of danger which the Commerce Clause, as interpreted by this Court in *Japan Line*, was intended to prevent.

The motion of the State of Florida should be denied, and probable jurisdiction should be noted.

Respectfully submitted,

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Nos. 84-902, 84-922 and 84-1041

In the Supreme Court of the United States

OCTOBER TERM, 1985

WARDAIR CANADA INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

LINEAS AEREAS COSTARRICENSES, S.A., ET AL., APPELLANTS

v.

FLORIDA DEPARTMENT OF REVENUE

AIR JAMAICA LIMITED, ET AL., APPELLANTS

v.

FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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103 pp

QUESTION PRESENTED

Whether a Florida sales tax on aviation fuel, as applied to fuel purchased by foreign airlines for use exclusively in international traffic, unconstitutionally impairs the power of the federal government to regulate foreign commerce.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-902

WARDAIR CANADA INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

No. 84-922

LINEAS AEREAS COSTARRICENSES, S.A., ET AL., APPELLANTS

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AIR JAMAICA LIMITED, ET AL., APPELLANTS

v.

FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the Florida Supreme Court in No. 84-902 (J.S. App. A1-A7) is reported at 455 So. 2d 326. The opinion of the Florida Supreme Court in No. 84-922 (J.S. App. 1a-2a) is unreported. The opinion of the Florida Supreme Court in No. 84-1041 (J.S. App. 28-30) is reported at 455 So. 2d 324. The opinions of the

Leon County Circuit Court (84-902 J.S. App. A21-A24; 84-922 J.S. App. 38a-50a; 84-1041 J.S. App. 31-36) are unreported.

JURISDICTION

The judgment of the Florida Supreme Court was entered in each case on June 14, 1984. Timely motions for rehearing were denied in each case on September 12, 1984 (84-902 J.S. App. A38; 84-922 J.S. App. 71a; 84-1041 J.S. App. 95). Notices of appeal in the Florida Supreme Court were filed respectively on November 15, 1984 (84-902 J.S. App. A39-A41), on November 14, 1984 (84-922 J.S. App. 73a-75a), and on November 28, 1984 (84-1041 J.S. App. 98-100). The jurisdictional statement in No. 84-902 was filed on December 5, 1984, and the jurisdictional statements in Nos. 84-922 and 84-1041 were filed on December 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2). Review lies by way of appeal where, as here, a state court has held a state tax statute applicable to a particular set of facts as against the contention that such application is invalid on federal grounds. *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 441 (1979).

STATEMENT

1. Appellants in these three cases are 19 airlines established under the laws of foreign countries and having their principal places of business outside the United States. The nations in which they are domiciled are located in North America (Canada and Mexico), Central America (Costa Rica, El Salvador and Honduras), South America (Argentina, Brazil, Colombia, Ecuador, Guyana and Peru), and the Caribbean (Barbados, Jamaica, and Trinidad & Tobago). Each appellant has been found by the Civil Aeronautics Board to be owned and effectively controlled by the government or nationals of its home country. About half the appellant airlines

are wholly owned[1] or substantially owned[2] by the governments of the nations in which they are domiciled.

Each appellant has been designated by its home country to provide international air transportation to and from the United States. Aviation relations between the United States and appellants' home countries are governed inter alia by a multilateral aviation agreement commonly known as the Chicago Convention (Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180 *et seq.*). In addition, all of the appellants' home countries, except Honduras, have entered into bilateral executive agreements with the United States respecting air transportation services.[3] Pursuant to these agreements (or, in the case of Honduras, pursuant to CAB authorization (84-922 J.S. App. 43a)), appellants fly only on routes between their home countries and specified cities, called "gateways," in the United States (*ibid.*). Appellants engage in no intrastate or interstate flights within this country, and

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[1] Aerolineas Argentinas, for example, is 100% owned by the Government of Argentina, Aeromexico by the Government of Mexico, Ecuatoriana by the Government of Ecuador, BWIA International by the Government of Trinidad & Tobago, and Varig by the Government of Brazil (84-922 J.S. App. 76a-79a).

[2] Mexicana, for example, is substantially owned by the Government of Mexico, Air Jamaica by the Government of Jamaica, Caribbean Air Cargo by the Government of Barbados, and Guyana Airways by the Government of Guyana (84-922 J.S. App. 77a; 84-1041 J.S. 17).

[3] After the Florida trial court entered judgment in these cases, the bilateral aviation agreements with three of appellants' home countries—Argentina, Brazil, and Peru—terminated. Negotiations toward new agreements have commenced, and it is not expected that the tax provisions of the new agreements, if any, will differ appreciably from those of their predecessors. For the sake of simplicity, we will in this brief generally refer to the relevant provisions of the bilateral agreements as they existed when the trial court rendered its decisions.

their operations here are thus exclusively in foreign commerce. See 49 U.S.C. App. 1508(b).

Each appellant operates to and from Miami, Florida, which is the primary domestic gateway for flights between the United States and South America, Central America, and the Caribbean, as well as a major stop for flights between this country and Europe. Appellants regularly purchase significant quantities of aviation jet fuel at Miami International Airport. This fuel is not purchased for export, but is consumed by appellants' airplanes in international commerce en route from Miami. Appellants are exempt from federal taxes on this aviation fuel by virtue of explicit provisions in the bilateral aviation agreements between the United States and their home countries, or, absent such provisions, by virtue of reciprocal tax exemptions provided to American carriers by appellants' home country governments.

2. For many years, Florida has imposed a sales tax on fuel purchased by common carriers, including airlines, within that State. This levy is an excise tax, not a user fee (84-922 J.S. App. 52a). The tax is technically imposed on the fuel supplier, but the supplier is required to pass the tax on to the purchaser (Fla. Stat. Ann. § 212.62(2) (West Supp. 1985)). Thus, the carrier bears the economic incidence of the tax.

Prior to April 1, 1983, Florida's sales tax on fuel, as it applied to all carriers, was prorated on a mileage basis. That is, a carrier paid only that portion of the otherwise-payable tax that represented the ratio of its Florida mileage to its worldwide mileage for the previous fiscal year. Fla. Stat. Ann. § 212.08(4) (West 1971). The Florida Supreme Court stated some years ago that this proration formula was designed "to prevent the State from exceeding its powers to tax interstate and foreign commerce" by ensuring that "Florida would only tax that portion of commerce activity that occurred within

the State." *Tropical Shipping & Construction Co.* v. *Askew,* 364 So. 2d 433, 435 (1978). Because appellants, following normal airline routes, travel only briefly in Florida air space, they and other foreign airlines paid little or no Florida fuel tax prior to April 1, 1983 (84-922 J.S. 3).

Effective April 1, 1983, the Florida Legislature substantially amended its fuel tax regime. The amendment most pertinent here was that repealing the mileage proration formula for airlines, while leaving it in effect for railroads engaged in interstate commerce and for vessels engaged in interstate or foreign commerce. Fla. Stat. Ann. § 212.08(4)(a)(2) (West Supp. 1985). As a result, airlines, including foreign airlines like appellants, are now taxed on all aviation fuel they purchase in Florida, even though that fuel is used exclusively in foreign commerce (84-922 J.S. App. 53a).[4]

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[4] Florida recently enacted, effective July 1, 1985, further amendments to its scheme of aviation fuel taxation. 1985 Fla. Laws 85-348, § 9. While exempting aviation fuel from sales tax, those amendments impose a new excise tax specifically on aviation fuel. *Id.* §§ 2, 3. The amount of the levy (5.7 cents per gallon) is virtually the same as under the version of the law here challenged (5% of a deemed price of $1.148 per gallon). Compare 1985 Fla. Laws 85-348, § 2, with Fla. Stat. Ann. § 212.62(3)(c) (West Supp. 1985). However, rather than applying (as did the sales tax) only to aviation fuel purchased in Florida (see Fla. Stat. Ann. § 212.08(4)(a)(2) (West Supp. 1985)), the new excise tax applies to "aviation fuel sold in this state, *or brought into this state for use*" (1985 Fla. Laws 85-348, § 2 (to be codified at Fla. Stat. § 206.9825) (emphasis added)). A refund of the new excise tax is to be allowed "not [to] exceed six-tenths of one percent of the wages paid by the carrier to employees located or based within this state" (1985 Fla. Laws 85-348, § 2 (to be codified at Fla. Stat. § 206.9855)). This refund provision, of course, will provide virtually no tax relief to foreign airlines like appellants, which typically have few if any employees based in Florida. Enactment of these amendments, which apply only prospectively (1985 Fla. Laws 85-348, § 9)), does not moot the instant appeals, which continue to present a live controversy concerning appellants' sales tax liability from April 1, 1983, to July 1, 1985.

3. Appellants brought these actions in the Leon County Circuit Court seeking declaratory and injunctive relief against the application of Florida's sales tax to them. Their principal contention was that the tax, as applied to aviation fuel used by foreign airlines in foreign commerce, is inconsistent with federal aviation policy, particularly as that policy is expressed in multinational and bilateral agreements executed by the United States and appellants' home countries. Appellants accordingly contended that Florida's tax, as applied, is unconstitutional under the Supremacy Clause and the Foreign Commerce Clause. See *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434 (1979).[5]

The circuit court did not explicitly declare Florida's aviation fuel tax unconstitutional. See 84-902 J.S. App. A23-A24; 84-922 J.S. App. 47a-48a; 84-1041 J.S. App. 35-36. However, the court found that the tax, as applied to appellants, was "inconsistent with the undertakings of the United States government in [its] international bilateral agreements," and it accordingly "recognize[d] an exemption from the fuel tax for [those] foreign

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[5] A number of domestic airlines likewise brought suits challenging Florida's sales tax on aviation fuel, predicating their challenges chiefly on the Due Process Clause, the Equal Protection Clause, and the Interstate Commerce Clause. The Florida courts largely rejected those challenges, and appeals raising those questions are now pending in this Court. *Northeastern International Airways, Inc. & Arrow Air, Inc.* v. *Florida Department of Revenue,* No. 84-921; *Eastern Airlines Inc.* v. *Florida Department of Revenue,* No. 84-926; *Delta Airlines, Inc.* v. *Florida Department of Revenue,* No. 84-929. The Court has invited our views in those cases, and a brief expressing those views is being filed contemporaneously herewith. To the extent that the foreign airlines in the instant appeals replicate arguments made by the domestic airlines—arguments that the Florida courts rejected, relying on the decisions mentioned above (84-902 J.S. App. A2, A23; 84-922 J.S. App. 2a, 39a; 84-1041 J.S. App. 2, 28-29, 32)—we address those arguments in our other brief.

airlines whose governments have entered into executive agreements with the United States * * * or who have been granted Foreign Air Carrier Permits by the United States on a basis of reciprocity and comity" (84-922 J.S. App. 48a, 49a-50a; see 84-902 J.S. App. A23-A24; 84-1041 J.S. App. 36). On that basis, the court granted appellants "a permanent injunction against [the Florida] Department of Revenue from assessing and collecting fuel taxes pursuant to" the challenged statute (84-1041 J.S. App. 36; see 84-902 J.S. App. A22; 84-922 J.S. App. 48a).

The court recognized that this Nation's bilateral aviation agreements, negotiated at various times over a 40-year period, deal with fuel taxes under somewhat differing rubrics, and that none of those agreements explicitly interdicts state or local, as opposed to "national" (viz., federal), taxes on aviation fuel. See 84-902 J.S. App. A23; 84-922 J.S. App. 41a; 84-1041 J.S. App. 33-34. At the same time, however, the court recognized that those agreements evidence a well-settled federal policy favoring "reciprocal tax exemptions" (84-922 J.S. App. 44a), a policy "designed to establish federal uniformity and prevent retaliatory taxes on U.S. carriers," and, by "prevent[ing] any discrimination, * * * to further the free flow of international aviation" (84-902 J.S. App. A22, A23). The court noted that " 'the Federal Government must speak with one voice when regulating commercial relations with foreign governments' " (84-922 J.S. App. 47a, quoting *Japan Line,* 441 U.S. at 449), and that federal aviation authorities over the years have consistently endeavored to persuade foreign nations to eliminate aviation fuel taxes on the basis of reciprocity (84-922 J.S. App. 46a). "[A]llowing the fifty states to impose individual state taxes," the court concluded, "would thwart the purpose of these federal efforts and infringe on the federal power to regulate foreign commerce" (*ibid.*).

Upon cross-appeals from the circuit court's judgments, the intermediate appellate court certified the cases directly to the Florida Supreme Court (84-922 J.S. App. 37a), which, in a divided opinion, "reverse[d] the circuit court's order to the extent that it recognized an exemption from the excise tax for the foreign airlines" (*id.* at 2a; 84-902 J.S. App. A6; 84-1041 J.S. App. 30). The Florida Supreme Court initially rejected appellants' argument, based on the Supremacy Clause, that Florida's tax was preempted by the federal bilateral agreements. The court believed that those agreements "clearly express an intent to apply to only national taxes and duties," and the court "d[id] not believe that the scheme of [those] agreement[s] is so pervasive as to permit the reasonable inference that Congress intended to preclude the state's power to tax" (84-902 J.S. App. A5; see 94-922 J.S. App. 2a; 84-1041 J.S. App. 28-29).

The court then addressed appellants' argument that Florida's tax, as applied to them, violates the Foreign Commerce Clause as interpreted by this Court in *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434 (1979). This Court there held that a state tax on the instrumentalities of foreign commerce is invalid if it either "creates a substantial risk of international multiple taxation" or "prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign Governments" (441 U.S. at 451 (original quotation marks omitted)). The Florida Supreme Court noted that "the first requirement of *Japan Line* was not a concern [here] because there had been no de facto showing of multiple taxation or substantial risk of the same" in the instant cases (84-902 J.S. App. A6). Disagreeing with the trial court, however, it also held that Florida's tax satisfies the second requirement of *Japan Line,* emphasizing that the

federal bilateral agreements explicitly address only national duties and charges and "do[ ] not provide for exemptions from state excise taxes." The court "presume[d] this has been done intentionally" and concluded that Florida's tax accordingly does not "prevent[ ] our federal government from speaking with one voice" (84-902 J.S. App. A6).

Justice Overton, joined by Justice McDonald, dissented. They contended that "the individual states of this country are precluded by [the federal bilateral] agreements from taxing fuel used by foreign airlines," noting that, under the majority's holding, "United States airlines could, in turn, be subject to local government taxation on fuel in foreign countries" (84-902 J.S. App. A7). The dissenting justices thus concluded that Florida's tax, as applied to appellants, violates the Supremacy Clause and the Foreign Commerce Clause.

DISCUSSION

This Court held in *Japan Line* that the Commerce Clause commits to the exclusive authority of the federal government the regulation of those aspects of foreign commerce which by their very nature require uniform national treatment. In our view, the imposition of levies and charges on airplane equipment and supplies, including aviation fuel, used by foreign airlines exclusively in international traffic is an aspect of foreign commerce that shares this nature. Florida's tax, as applied to appellants, is inconsistent with strongly-articulated federal policy in this area and with accepted international practice. The tax, as thus applied, should be invalidated.

A. The Federal Government Is Committed To A Policy Of Reciprocal Tax Exemptions For Fuel And Supplies Used By Foreign Airlines In Foreign Commerce, And This Policy Represents The Established Practice Of Nations In The Aviation Field

This Nation's aviation relations with foreign governments are implemented through a comprehensive network of treaties, bilateral executive agreements, informal arrangements, and federal statutory provisions. The pattern produced by these varied strands, a pattern to which the federal government has long been committed, is one of reciprocal tax exemptions for aircraft, equipment and supplies, including aviation fuel, that constitute the instrumentalities of international air traffic. Due in part to our Nation's advocacy, this pattern has become the accepted international norm in the aviation field, a consensus that reflects the longstanding custom of nations in international maritime trade.

1. The United States and 156 other nations, including all of appellants' home countries, are parties to the Chicago Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180 *et seq.* That Convention binds its signatories to implement various measures to facilitate air transportation (arts. 22-28, 61 Stat. 1186-1188). One of these measures, set forth in Article 24(a), provides that aircraft engaged in international traffic, as well as "[f]uel, lubricating oils, spare parts, regular equipment and aircraft stores on board [such] an aircraft," shall, upon arrival in a contracting state, "be exempt from customs duty, inspection fees or similar national *or local* duties and charges" (61 Stat. 1186 (emphasis added)).

Article 24(a) explicitly applies only to aviation fuel and supplies which are "on board an aircraft * * * on arrival * * * and retained on board on leaving" a given

country (61 Stat. 1186). Consistently with the purposes of the Chicago Convention, however, Article 24(a)'s policy of reciprocal exemptions has been accorded much broader scope. As a party to the Convention, the United States is a member of the International Civil Aviation Organization (ICAO), which was established by the Convention (arts. 43-66, 61 Stat. 1192-1200) to "[a]void discrimination among contracting States" and to "[p]romote generally the development of all aspects of international civil aeronautics" (art. 44, 61 Stat. 1193). During 1948-1951, the Air Transport Committee of ICAO, recognizing that the Convention "did not attempt to deal comprehensively with tax matters," undertook a "comprehensive study of the various existing and anticipated problems related to taxation in the field of international air transport." *ICAO's Policies on Taxation in the Field of International Air Transport,* ICAO Doc. 8632-C/968, at 1 (Nov. 1966) [hereinafter cited as *ICAO Policies*]. Upon completion of that study, the ICAO Council in 1951 adopted resolutions designed "to reduce to the fullest possible extent all forms of taxation on the sale or use" of the instrumentalities of air traffic (*id.* at 2).

During 1965-1966, ICAO exhaustively reviewed the responses of the Chicago Convention's contracting states to the 1951 resolutions. It found that "it is the common practice of many States with respect to ships and aircraft engaged in international navigation" not only "to exempt from taxation all fuel and lubricants on board on arrival" in a given territory, but also, "on a basis of reciprocity, to exempt from or refund taxes on fuel and lubricants taken on board at the final port of call in that territory." *ICAO Policies* 3. And ICAO found it desirable "to extend such exemptions or refunds to other consumable technical supplies, which, like fuel and lubricants, * * * are consumed during flight and are essential for that purpose" (*ibid.* (footnote omitted)).

Consistently with these findings, the ICAO Council adopted, on November 14, 1966, the following Resolution (*ICAO Policies* 3):

> [F]uel, lubricants and other consumable technical supplies taken on board [an aircraft] for consumption during [an international] flight shall be furnished exempt from all customs and other duties or, alternatively, any such duties levied shall be refunded * * *.

The Resolution defined "customs and other duties" to include "import, export, excise, sales, consumption and internal duties and taxes of all kinds levied upon the fuel, lubricants and other consumable technical supplies *by any taxing authority within a State*" (*id.* at 4 (emphasis added)).

The ICAO Council explained that this Resolution "endorsed the policy of reciprocal exemption" from taxes on aviation fuel used in international commerce, and that it reflected "longstanding maritime practice and the established policy of many States" (*ICAO Policies* 5). It noted that the policy of reciprocal tax exemptions had been "incorporated in the 1939 London Convention concerning Exemption from Taxation for Liquid Fuel and Lubricants Used in Air Traffic," a convention which had been "signed by representatives of 38 States" but which "never came into force as many of the signatories shortly thereafter found themselves at war" (*id.* at 1, 5). And the ICAO noted "the obvious practical difficulties inherent in adopting any other course," concluding that a policy of reciprocal tax exemptions by all taxing jurisdictions was "the only [course] available in the foreseeable future which would, in a simple and effective manner, assure equitable treatment for international aviation" (*id.* at 5).

Virtually all nations party to the Chicago Convention have substantially implemented the 1951 and 1966

ICAO Resolutions, and, accordingly, grant aviation fuel purchased by foreign airlines for use in international traffic a complete exemption from taxes, including sales, use, and excise taxes, regardless of whether such taxes are levied by the national government or by its political subdivisions.[6] The nations granting such across-the-board exemptions include most of our trading partners (such as Australia, China, Denmark, the Federal Republic of Germany, Greece, Japan, the Netherlands, Switzerland, and the United Kingdom), and most of the nations in which appellants are domiciled. The sole exception appears to be Canada, whose provinces impose taxes on aviation fuel and, like Florida, generally do not grant an exemption for fuel purchased by foreign airlines for use in foreign commerce. With that exception, however, the policy of reciprocal tax exemptions by all taxing authorities represents uniform international practice.

2. In the 38 years since the Chicago Convention came into force, the United States has signed bilateral aviation agreements with more than 70 foreign countries. Whereas the Convention itself is a treaty ratified by the Senate (see 61 Stat. 1180), these bilateral undertakings are typically executive agreements. They extend, with varying degrees of explicitness, a bilateral commitment parallel to that expressed multilaterally in Article 24(a) of the Chicago Convention and in ICAO's implementing Resolutions.

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[6] A few nations (such as France) appear to limit their reciprocal exemption policy to commercial aircraft, as opposed to private airplanes. We are informed by the State Department that political subdivisions in India have legal authority to impose sales taxes on aviation fuel. However, in response to a directive from the central government, all Indian states to which United States airlines fly currently exempt fuel uplifted by international carriers from sales tax.

Almost all our bilateral agreements obligate the United States to "exempt the designated * * * airlines of the other Contracting Party to the fullest extent possible under [our] national law, on the basis of reciprocity, from import restrictions, customs duties, excise taxes, inspection fees, and other national duties and charges on fuel, lubricants" and other equipment and supplies used in international air service.[7] Several agreements accomplish the same result by binding the United States to accord airlines of the other contracting party, with respect to taxes on aviation fuel and supplies, "treatment not less favourable than that granted to * * * carriers of the most favoured nation."[8] Some of the earlier compacts, like Article 24(a) of the Chicago Convention, expressly refer only to aviation fuel and supplies "introduced into" the United States or "retained on board [the] aircraft * * * upon arriving in or leaving" this country.[9] The more modern agreements,

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[7] Air Transport Services Agreement, Oct. 2, 1969, United States-Jamaica, art. 8(A), 20 U.S.T. 2966, *reprinted at* 84-1041 J.S. App. 101. See, *e.g.*, Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, art. XII(1), 25 U.S.T. 794, *reprinted at* 84-902 J.S. App. A58; Air Transport Services Agreement, Aug. 15, 1960, United States-Mexico, art. 7, 12 U.S.T. 65, *reprinted at* 84-922 J.S. App. 90a; Air Transport Services Agreement, Oct. 24, 1956, United States-Columbia, art. 7, 14 U.S.T. 432, *reprinted at* 84-922 J.S. App. 85a.

[8] Air Transport Services Agreement, Feb. 11, 1946, United States-United Kingdom, art. 3(2), 60 Stat. 1500, *reprinted at* 84-922 J.S. App. 92a (governing aviation relations with Guyana and Trinidad & Tobago). See, *e.g.*, Air Transport Services Agreement, Jan. 8, 1947, United States-Ecuador, art. 3(b), 61 Stat. 2775, *reprinted at* 84-922 J.S. App. 89a; Air Transport Services Agreement, Dec. 27, 1946, United States-Peru, art. 3(b), 61 Stat. 2587, *reprinted at* 84-1041 J.S. App. 113.

[9] Air Transport Services Agreement, Jan. 8, 1947, United States-Ecuador, art. 3(b) and (c), 61 Stat. 2775, *reprinted at* 84-922 J.S. App. 89a. See, *e.g.*, Air Transport Services Agreement, Dec. 27, 1946, United States-Peru, art. 3(b) and (c), 61 Stat. 2587, *reprinted at* 84-1041 J.S. App. 113.

however, follow the 1951 and 1966 ICAO Resolutions by extending the reciprocal exemption privilege explicitly to cover items "supplied in" this country,[10] that is, aviation fuel and supplies "taken on board aircraft of the carriers of [the other] Contracting Party in the territory of the [United States] and intended solely for use in international air services."[11]

In according reciprocal exemptions for aviation fuel taken on board foreign aircraft within this country, our bilateral agreements typically refer to "national duties and charges,"[12] charges "imposed by the national authorities,"[13] or "federal taxes."[14] Some agreements refer to duties or charges "imposed by the * * * Contracting Party,"[15] others to "national duties or charges

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[10] Air Transport Services Agreement, Oct. 20, 1983, United States-Costa Rica, art. 9(2)(a) and (c), *reprinted at* 84-922 J.S. App. 87a-88a. See, *e.g.*, Air Transport Services Agreement, Apr. 8, 1982, United States-Barbados, art. 9(2)(a) and (c), T.I.A.S. No. 10370, *reprinted at* 84-1041 J.S. App. 110.

[11] Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, art. XII(1)(c), 25 U.S.T. 794, *reprinted at* 84-902 J.S. App. A58. See, *e.g.*, Air Transport Services Agreement, Oct. 24, 1956, United States-Colombia, art. 7(D), 14 U.S.T. 432, *reprinted at* 84-922 J.S. App. 85a.

[12] *E.g.*, Air Transport Services Agreement, May 8, 1974, United States-Canada, art. XII(1), 25 U.S.T. 794, *reprinted at* 84-902 J.S. App. A58; Air Transport Services Agreement, Aug. 15, 1960, United States-Mexico, art. 7, 12 U.S.T. 65, *reprinted at* 84-922 J.S. App. 90a-91a.

[13] *E.g.*, Air Transport Services Agreement, Oct. 20, 1983, United States-Costa Rica, art. 9(1), *reprinted at* 84-922 J.S. App. 87a.

[14] *E.g.*, Air Transport Services Agreement, June 23, 1982, United States-Brazil, art. IX, *reprinted at* 84-922 J.S. App. 83a.

[15] *E.g.*, Air Transport Services Agreement, Feb. 11, 1946, United States-United Kingdom, art. 3(2), 60 Stat. 1500, *reprinted at* 84-922 J.S. App. 92a.

[imposed] by the contracting party,"[16] and others simply to "exemption from taxes,"[17] without specifying what taxing jurisdictions are meant to be covered. Exemptions from federal charges are implemented through a host of statutory and regulatory provisions, which accord foreign-owned instrumentalities of air traffic treatment parallel to that accorded foreign-owned instrumentalities of maritime trade.[18]

Unlike our earlier agreements, our most recent bilateral aviation compacts—generally, those dating from 1978 onwards—explicitly address taxes imposed by political subdivisions as well as by the federal government. These agreements typically commit the United States to "use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on [aviation fuel and supplies], except to the extent that the charges are based on the actual cost of providing the service."[19] Such "best efforts" clauses concerning state and local taxes are contained in agreements recently executed or negotiated with 18 foreign nations, including

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[16] *E.g.*, Air Transport Services Agreement, Jan. 8, 1947, United States-Ecuador, art. 3(b), 61 Stat. 2775, *reprinted at* 84-922 J.S. App. 89a.

[17] *E.g.*, Air Transport Services Agreement, Sept. 22, 1977, United States-Argentina, art. F(3), 29 U.S.T. 2801, *reprinted at* 84-922 J.S. App. 82a.

[18] See, *e.g.*, 19 U.S.C. 1435 (entry of foreign vessels); 19 C.F.R. Pt. 4 (same); 49 U.S.C. App. 1509(c) (entry of foreign aircraft); 19 C.F.R. Pt. 6 (same); 26 U.S.C. 4221(a)(3), (d)(3) and (e)(1) (exemption from federal excise tax on the basis of reciprocity for fuel and supplies used in international air transport).

[19] *E.g.*, Air Transport Services Agreement, Apr. 8, 1982, United States-Barbados, art. 9(5), T.I.A.S. No. 10370, *reprinted at* 84-1041 J.S. App. 110.

the home countries of four of the appellants here (Barbados, Costa Rica, El Salvador and Jamaica)[20] and such important trading partners as China, the Federal Republic of Germany, Israel, and the United Kingdom.

3. As the above discussion reveals, none of our bilateral aviation agreements explicitly interdicts state or local taxes on aviation fuel used by foreign airlines in international traffic. To that extent, the bilateral agreements do not in terms reflect the full scope of our federal aviation policy, or the full scope of the international consensus evidenced by the 1951 and 1966 ICAO Resolutions, favoring reciprocal tax exemptions by *all* taxing jurisdictions. The reasons for this are largely of an economic and historical, partly of a legal, nature.

State taxation of international aviation has only recently become a matter of international concern. The period immediately following adoption of the Chicago Convention, when our bilateral agreements were first negotiated, coincided with the early days of commercial jet travel, a time when relatively few foreign airlines served the United States and when those that did serve it operated to a mere handful of international gateways here. Most foreign airlines purchased bonded fuel, which, under this Court's decisions (*McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414 (1940)), was exempt from state taxes, and which, prior to the 1973 OPEC oil embargo, was both inexpensive and readily available. State taxing authorities thus had little reason to regard international aviation as a potential source of revenue. In those

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[20] See note 19, *supra*; Air Transport Services Agreement, Oct. 20, 1983, United States-Costa Rica, art. 9(5), *reprinted at* 84-922 J.S. App. 88a; Air Transport Services Agreement, Apr. 2, 1982, United States-El Salvador, art. 9(5), T.I.A.S. No. 10488, *reprinted at* 84-1041 J.S. App. 115; Air Transport Services Agreement, Apr. 4, 1979, United States-Jamaica, art. 10(6), T.I.A.S. No. 9613, *reprinted at* 84-1041 J.S. App. 104.

relatively rare instances where state tax laws did (at least theoretically) reach aviation fuel used by foreign airlines, those taxes (like Florida's prior to April 1, 1983) were of the "burn-off" variety, *i.e.*, were prorated on a mileage basis. Since foreign airlines traveled only briefly in such states' air space, they would pay little if any fuel tax in actual practice. Finally, our early aviation agreements were negotiated at a time when the Executive Branch entertained some doubt about its constitutional authority to enter into such compacts, which are typically executive agreements rather than treaties, much less to use them as a vehicle for preempting state laws. The State Department's usual practice, in any event, was to exercise restraint on this score, particularly where (as was until recently true here) state taxes were of little practical concern to our trading partners. See 11 Foreign Affairs Manual § 721.3(b) (Feb. 25, 1985) (State Department guidelines on treaties and other international agreements, or "Circular 175") (citing potential conflict with state law as a factor to be considered in deciding whether to enter into a treaty or an executive agreement).

The field of international aviation has changed dramatically in recent years. The number of foreign airlines serving the United States, and the number of domestic gateways to which they fly, have increased geometrically. See M. Brenner, J. Leet & E. Schott, *Airline Deregulation* 119 (1985). The price of aviation fuel has risen about 700% since the OPEC oil embargo. *Id.* at 106. Bonded fuel, which was once readily available at all gateways, is now available at only one or two.[21] In

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[21] Following the OPEC embargo, the price of bonded fuel, which must be manufactured exclusively from crude oil produced abroad, rose sharply as compared with the price of fuel manufactured from domestic supplies. Subsequently-enacted federal price and allocation regulations (see 15 U.S.C. (1976 ed.) 751 *et seq.*) further

short, the very factors that once made international aviation an unlikely source of state revenue now make it a rather tempting target.

It is thus no accident that our most recent bilateral agreements expressly commit the United States and its contracting partners to use their "best efforts" to ensure exemption from regional and local, as well as national, taxes on aircraft fuel and supplies. Although these provisions stop short of explicitly banning such levies, they are very strong expressions of federal policy on the subject. Indeed, many of our bilateral aviation agreements, in specifying the federal government's obligations generally, use similar executory language, requiring the United States (for example) to grant exemptions from national duties "to the fullest extent possible,"[22] to make "efforts * * * to provide * * * for exemption from taxes,"[23] to "make all possible efforts to ensure * * * exemption from federal taxes,"[24] and to "exercise [its] best efforts" to ensure the availability of various privileges.[25] The Chicago Convention, similarly,

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limited the availability of bonded fuel. Because of its relatively high price and scarcity, foreign carriers, which in 1968 had derived 90% of their fuel from bonded stocks, derived only 4% of their supply therefrom by 1977. See U.S. Dep't of Energy, *Findings and Views Concerning the Exemption of Kerojet Fuels from the Mandatory Petroleum Allocation and Price Regulations* 38-40 (1978). Owing to this shrinkage in demand, the elaborate dedicated delivery and storage systems for bonded fuel, established to meet Customs Service regulations, were dismantled or combined with non-bonded fuel supply networks.

[22] *E.g.*, Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, art. XII(1), 25 U.S.T. 794, *reprinted at* 84-902 J.S. App. A58.

[23] *E.g.*, Air Transport Services Agreement, Sept. 22, 1977, United States-Argentina, art. F(3), 29 U.S.T. 2801, *reprinted at* 84-922 J.S. App. 82a.

[24] *E.g.*, Air Transport Services Agreement, June 23, 1982, United States-Brazil, art. IX(4), *reprinted at* 84-922 J.S. App. 83a.

[25] *E.g.*, Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, art. XI(3), XVI(3), 25 U.S.T. 794, 796, *reprinted at* 84-902 J.S. App. A58, A60.

obligates the United States to implement certain measures "to the greatest possible extent" (art. 12, 61 Stat. 1183) or "so far as it may find practicable" (arts. 23, 28, 61 Stat. 1186, 1188). The "best efforts" clauses concerning state and local taxes in our recent bilateral agreements have equal dignity with these provisions, and are properly regarded by foreign nations as expressing a strong federal commitment to the policy of reciprocal tax exemptions by *all* taxing jurisdictions.

4. Federal aviation authorities have made aggressive efforts over the years to implement the policy of reciprocal exemptions both internationally and domestically. Diplomatic steps have regularly been taken to encourage foreign nations to make and, once made, to honor, commitments to accord tax exemptions for aviation fuel used by United States carriers in foreign commerce.[26] In 1982, the State Department received communications from the United Kingdom expressing concern about the imposition of aviation fuel taxes by political subdivisions in this country. The Department thereupon wrote the tax authorities of various states, including Florida, noting that "foreign governments have questioned the appropriateness of imposing [such levies] on foreign air carriers in view of the generally-accepted and longstanding international practice of reciprocally exempting such items" (84-922 J.S. App. 95a). Some nations, the Department noted, "have raised the possibility that state and local authorities in their jurisdictions could impose similar taxes on U.S. airlines," a result that "would frustrate the inter-

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[26] See, *e.g.*, U.S. Civil Aeronautics Board, *FY 1976 Report to Congress* 103-104 (1977) (discussing steps taken to protest actions by Argentina and Colombia respecting aviation fuel taxes); U.S. Civil Aeronautics Board, *FY 1977 Report to Congress* 108, 109, 112, 114 (1978) (same, actions by Chile, Colombia, Japan, and the Philippines).

national system of reciprocal tax exemptions and thereby significantly increase the cost of international air transportation" (*ibid.*). The Department emphasized that this was "an important matter affecting U.S. international relations" and urged state revenue authorities to exempt foreign air carriers, on the basis of reciprocity, "from taxes on aviation fuel and other items for which the federal government grants an exemption" (*id.* at 94a-95a).

Several months later, Florida announced its proposal to extend its aviation fuel tax, effective April 1, 1983, to fuel consumed by foreign airlines in foreign commerce. The State Department again wrote the Florida Department of Revenue, noting that it was "surprised and distressed" to learn of this proposal, and again urging the State to exempt foreign airlines "based on reciprocity" (84-922 J.S. App. 99a). The Department warned that Florida's failure to afford such an exemption "will cause serious foreign relations problems" (*ibid.*).

The foreign relations problems predicted by the State Department quickly materialized. To date, the United States has received diplomatic notes from 25 foreign countries (App., *infra,* 1a-58a) protesting Florida's tax on aviation fuel and similar taxes, enacted or proposed, by Illinois (*id.* at 25a, 36a, 58a) and New York (*id.* at 48a). The protesting governments include many of appellants' home countries, as well as Belgium, France, the Federal Republic of Germany, Iceland, Israel, Italy, Japan, the Netherlands, Norway (on behalf of itself, Denmark, and Sweden), Panama, Spain, Switzerland, the United Kingdom, and Yugoslavia.

The diplomatic notes uniformly point to the "international consensus" (App., *infra,* 10a, 23a, 42a, 44a, 53a) and the "established international practice" (*id.* at 2a, 5a, 8a, 12a, 35a, 40a, 49a) of according reciprocal tax exemptions for aviation fuel used in international traffic. They emphasize that this consensus, as evidenced by

the 1951 and 1966 ICAO resolutions, entails exemption from regional and local, as well as from national, levies (App., *infra*, 2a, 5a, 6a, 8a, 13a, 20a, 23a, 30a, 35a, 37a, 40a, 46a-47a, 48a, 53a). Several foreign governments point out that their political subdivisions do not impose taxes on fuel purchased by United States airlines (*id.* at 1a, 5a, 8a, 13a, 21a, 50a, 53a, 57a), advising that their restraint in this respect is "based on the assumption that the United States will provide reciprocal treatment to [their] carriers" (*id.* at 1a). Florida's tax, in their view, "undermines the basis of reciprocity that has previously existed" between their nations and ours (*id.* at 2a, 9a, 21a, 53a), inviting retaliatory measures by local jurisdictions elsewhere (*id.* at 5a, 9a, 23a, 41a, 48a). The diplomatic notes repeatedly stress the damage that a proliferation of such taxes would cause to international aviation (*id.* at 9a, 10a, 14a, 23a), and, in several instances, take the position that Florida's tax is inconsistent with the bilateral aviation compacts that the United States has executed with their governments (*id.* at 2a, 5a, 13a, 16a, 31a, 37a, 46a, 53a).

B. A State Tax Is Invalid Under The Commerce Clause If It Frustrates Attainment Of Federal Uniformity On An Aspect Of Foreign Commerce As To Which Federal Uniformity Is Essential, And Thus Prevents The Federal Government From Speaking With One Voice When Regulating Commercial Relations With Foreign Countries

1. In *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), this Court outlined the constitutional analysis to be employed under the Commerce Clause where a state seeks to tax the instrumentalities of foreign commerce. Appellants there were six Japanese maritime companies whose cargo shipping containers were subjected to an ad valorem property tax in Cali-

fornia (441 U.S. at 436). The containers, like the ships on which they were carried, were owned by the Japanese companies, were domiciled and registered in Japan, and were used exclusively in international traffic (*id.* at 436-437).

This Court assumed arguendo that the property tax, as applied to the Japanese containers, would pass the nexus, apportionment, and nondiscrimination tests of *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 279 (1977), and hence would be valid under the Commerce Clause "if the containers at issue * * * were instrumentalities of purely interstate commerce" (441 U.S. at 445, 451). However, because the containers were "instrumentalities of foreign commerce," the Court held that it was necessary to answer two further questions in assessing the tax's validity: "first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments" (*id.* at 451 (original quotation marks omitted)). "If a state tax contravenes either of these precepts," the Court held, "it is unconstitutional under the Commerce Clause" (*ibid.*).

The Court concluded that California's tax, as applied, failed both of these tests (441 U.S. at 451, 453). It noted that the containers were taxed on their full value in Japan, so that California's levy necessarily caused international multiple taxation (*id.* at 436, 446-448, 451-452). And it held that California's tax would "frustrate attainment of federal uniformity" in an area—the imposition of charges on cargo containers used exclusively in international traffic—"where federal uniformity is essential" (*id.* at 448, 453).

The Court relied principally on two considerations in determining that the taxation of cargo containers was a

subject "necessitat[ing] a uniform national rule" (441 U.S. at 449). First, the Court noted that California's levy "create[d] an asymmetry in the international tax structure" (*id.* at 450). A state tax on foreign commerce, the Court said, "must be evaluated in the realistic framework of the custom of nations" (*id.* at 454). Under longstanding international practice, "[o]ceangoing vessels" and "[a]ircraft engaged in international traffic" were immune from taxation except by the nation of their registry or domicile (*id.* at 447 n.11). Cargo shipping containers were likewise regarded by the world community as "instruments of international traffic" (*id.* at 445-446 & n.10), and Japan accordingly taxed appellants' containers "consistently with the custom of nations" (*id.* at 447, 454) with the legitimate expectation that they would not be taxed elsewhere.[27]

A corollary of the "novel[ty]" of California's tax, when viewed against the established custom of nations, was the risk that other countries would retaliate against American carriers, a result that would plainly "place * * * impediments before this Nation's conduct of its foreign relations and its foreign trade" (441 U.S. at 450, 453). It was stipulated that "American-owned containers are not taxed in Japan," so that California's tax "create[d] an asymmetry in international maritime taxation operating to Japan's disadvantage." Under these circumstances, "[t]he risk of retaliation by Japan" was, in the Court's words, "acute." *Id.* at 453. Indeed, the Court noted that some nations provide a tax exemption for foreign-owned instrumentalities of commerce "only if the owner's country grants a reciprocal exemption"

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[27] In our brief amicus curiae in *Japan Line* (77-1378 Br. at 14a), we noted the State Department's findings that "no foreign government, or political subdivision such as a province, state or municipality, imposes property taxes on foreign flag vessels, airlines, or containers, with the possible exception of Afghanistan."

(*id.* at 453 n.18). Hence, "[r]etaliation by some nations could be automatic" and "of necessity would be directed at American transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer" (*id.* at 450, 453 & n.18).

The second factor which the Court in *Japan Line* held to evidence "[t]he desirability of uniform treatment of containers used exclusively in foreign commerce" was the Customs Convention on Containers, May 18, 1956, 20 U.S.T. 301 *et seq.*, a multilateral compact ratified by the Senate to which both this country and Japan were party (441 U.S. at 452). Under that Convention, containers temporarily imported into this country are admitted free of customs duty and of "all duties and taxes whatsoever chargeable by reason of importation" (*id.* at 453 (citing 20 U.S.T. 304)). The Court did not hold that the Container Convention preempted California's tax under the Supremacy Clause; indeed, the Convention does not address state and local taxes, or any taxes other than those "chargeable by reason of importation." But the fact that Congress "ha[d] not pre-empted the field by affirmative regulation" was not in the Court's view dispositive of the Commerce Clause outcome, since that Clause, " 'without the aid of congressional legislation . . . affords some protection from state legislation inimical to the national commerce' " (*id.* at 454, quoting *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945)). The Container Convention, while not necessarily a source of preemption, was relevant to the Court's Commerce Clause inquiry because it "reflect[ed] a national policy to remove impediments to the use of containers as 'instruments of international traffic' " (441 U.S. at 453, quoting 19 U.S.C. 1322(a)), and hence showed that it would be inimical to the national commerce for California to tax foreign-owned containers as it sought to do.

2. In subsequent decisions, this Court has consistently reaffirmed the principles of *Japan Line*, both its general analytical approach and its particular sensitivity to state actions that may adversely affect this Nation's foreign commerce. See *South-Central Timber Development, Inc.* v. *Wunnicke*, No. 82-1608 (May 22, 1984), slip op. 18; *Container Corporation* v. *Franchise Tax Board*, 463 U.S. 159, 171, 184-197 (1983); *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U.S. 425, 446-449 (1980). With equal consistency, however, the Court has declined to expand the principles of *Japan Line* to invalidate state taxes imposed on the income of domestically-based multinational corporations. The Court has reached that result whether the income takes the form of foreign-source dividends (*Mobil Oil Corp.*, 445 U.S. at 446-448) or foreign-source operating earnings (*Container Corporation*, 463 U.S. at 169 n.7).

The Court in *Container Corporation* noted "a number of important [similarities]" (463 U.S. at 187) between that case and *Japan Line*. The multinational taxpayer in each case had demonstrated some degree of "actual double taxation" (463 U.S. at 184, 187 & n.22). And California in each case had adopted a taxing policy (in *Container Corporation*, the "unitary method" of apportioning transnational income) that reflected "a serious divergence" from the policy adopted by the federal government (in *Container Corporation*, the "arm's-length method" of allocating intercorporate income), a federal policy which in turn was "consistent with accepted international practice" (463 U.S. at 187). But the Court also noted that there were "a number of ways in which [*Container Corporation* was] clearly distinguishable from *Japan Line*" (463 U.S. at 187), and these distinctions were held to carry the day.

First, the Court noted (463 U.S. at 187-188), as it had in *Mobil Oil Corp.* (445 U.S. at 448), that there are sub-

stantial differences between taxes on the income of a domestic taxpayer and "ad valorem property taxes assessed directly upon instrumentalities of foreign commerce." Taxes on foreign ships and planes, obviously, burden commerce in a more immediate and concrete way than taxes on the international cash flows of a domestic company. The Court emphasized, moreover, the difficulty of trying to figure out where the income of a multinational unitary business is really "earned." *Container Corporation,* 463 U.S. at 164-169, 192. Accord, *e.g., Exxon Corp.* v. *Wisconsin Dep't of Revenue,* 447 U.S. 207, 222 (1980); *Mobil Oil Corp.,* 445 U.S. at 438-439. Such difficulties, of course, do not attend efforts to ascertain the registry of an airplane or the home port of a ship.

A corollary of this difference between taxes on instrumentalities and taxes on income was a marked difference in "the alternatives reasonably available to the taxing State" (463 U.S. at 189, 192). In *Japan Line,* the state could avoid any burden on foreign commerce "simply by adhering to one bright-line rule: do not tax, to any extent whatsoever, cargo containers 'that are owned, based, and registered abroad and that are used exclusively in international commerce' " (463 U.S. at 189-190 (quoting 441 U.S. at 444)). To require that the State in *Japan Line* adhere to this rule "was by no means unfair, because the rule did no more than reflect consistent international practice and express federal policy" (463 U.S. at 190). In *Container Corporation,* by contrast, the state could not reasonably be expected utterly to refrain from taxing the domestic company's income, some of which was plainly earned within the state; and the question thus boiled down to a choice between competing allocation methods, each of which was concededly imperfect (463 U.S. at 182-184), and each of which could end up burdening foreign commerce depending on the particular facts involved (*id.* at 188 &

n.25, 190-193). In short, the Court did not believe that there existed in *Container Corporation,* as there existed in *Japan Line,* any method, at once obvious and fair, by which the state could ensure that foreign commerce would be perfectly protected.

Secondly, the Court in *Container Corporation* emphasized that the tax there "f[ell], not on the foreign owners of an instrumentality of foreign commerce, but on a corporation domiciled and headquartered in the United States" (463 U.S. at 188). "The most obvious foreign policy implication of a state tax," the Court noted, "is the threat it might pose of offending our foreign trading partners and leading them to retaliate against the Nation as a whole" (*id.* at 194 (citing *Japan Line,* 441 U.S. at 450)). Given the American residency of the taxpayer in *Container Corporation,* the risk of retaliation in that case, relatively speaking, was slight, for foreign governments generally have little interest "in reducing the tax burden of domestic corporations" (463 U.S. at 195). The Court observed that it had "specifically left open in *Japan Line* the application of that case to 'domestically owned instrumentalities engaged in foreign commerce' " (463 U.S. at 188-189 (quoting 441 U.S. at 444 n.7)), and, contrariwise, it specifically left open in *Container Corporation* the application of that case to the income of foreign or foreign-owned corporations (463 U.S. at 189 n.26).[28]

Besides the taxpayer's American domicile, the Court in *Container Corporation* cited other factors suggesting that the foreign relations impact there, as compared with *Japan Line,* would likely be marginal. Whereas in *Japan Line* "a convention signed by the United States

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[28] Since the instant appeals present challenges to a state excise tax on aviation fuel, the Court in these cases would likewise have no occasion to address the validity of state income taxes imposed on foreign or foreign-owned corporations.

and Japan made clear * * * that neither National Government could impose a tax on temporarily imported cargo containers whose home port was in the other nation" (463 U.S. at 185), no comparable multilateral treaty existed in the income tax field. Although the United States had signed bilateral income tax agreements with many foreign nations, none addressed "the taxing activities of subnational governmental units such as States" (463 U.S. at 196 (footnote omitted)). Whereas the tax in *Japan Line* had created an asymmetry in international maritime taxation that *automatically* operated to foreign countries' disadvantage (463 U.S. at 194-195 (citing *Japan Line*, 441 U.S. at 453)), the Court did not believe that the same was true in *Container Corporation*, since California's "unorthodox treatment" could on the Court's view help or hurt a given taxpayer depending on the particular facts involved (463 U.S. at 195). Finally, the Court "note[d] * * * that in [*Container Corporation*], unlike *Japan Line*, the Executive Branch ha[d] decided not to file an *amicus curiae* brief in opposition to the state tax" (463 U.S. at 195 (footnote omitted)). For all these reasons, the Court concluded that California's unitary method of taxing domestic companies' income, unlike California's tax on the instrumentalities of foreign commerce in *Japan Line*, neither "implicate[d] foreign policy issues which must be left to the Federal Government" nor "violate[d] a clear federal directive," and hence did not prevent this Nation from speaking with one voice in foreign affairs (463 U.S. at 194).

C. Florida's Tax On Aviation Fuel Used By Foreign Airlines Exclusively In Foreign Commerce Is Inconsistent With Express Federal Policy And Established International Practice And Hence Should Be Invalidated Under The Commerce Clause

These cases present a substantial federal question concerning the power of a state to levy an excise tax on the instrumentalities of foreign commerce. This question is not directly controlled by any of this Court's prior decisions. However, we think that the situation here comes very close indeed to that presented in *Japan Line,* and we believe that Florida's tax should be declared unconstitutional as applied.

1. We agree with the courts below (see 84-902 J.S. App. A6, A33) that the "multiple taxation" aspect of *Japan Line* is not a concern in the instant cases. Appellants have not proved—indeed, they have not argued—that Florida's sales tax on aviation fuel "produces multiple taxation in fact" (*Japan Line,* 441 U.S. at 452). Nor do we think that Florida's tax "creates a substantial risk of international multiple taxation" (*id.* at 451). As this Court has noted in sustaining analogous state taxes on aviation fuel used by domestic carriers on interstate flights, the "taxable event" is the carrier's purchase of the fuel or its "withdrawal [of the fuel] from storage." *United Air Lines, Inc.* v. *Mahin,* 410 U.S. 623, 627 (1973). Accord, *Edelman* v. *Boeing Air Transport, Inc.,* 289 U.S. 249, 251-252 (1933); *Eastern Air Transport, Inc.* v. *South Carolina Tax Comm'n,* 285 U.S. 147, 152-153 (1932).[29] These taxable events, ob-

[29] These cases clearly do not control the outcome here. In each case, the airline was a domestic rather than a foreign corporation, and it appears that solely interstate, rather than international, flights were involved. See *United Air Lines, Inc.,* 410 U.S. at 624, 625, 629; *Edelman,* 289 U.S. at 250-251; *Eastern Air Transport,*

viously, take place entirely within the taxing state, and no foreign government, consistently with the custom of nations, could undertake to impose a levy upon them. In fact, far from being able to tax the event of sale, foreign nations could not purport to tax even the fuel itself, which typically will be consumed in international air space en route from the United States.

2. We agree with appellants, however, that Florida's tax is invalid under the "federal uniformity" aspect of *Japan Line,* which, as the Court there emphasized (441 U.S. at 451), is a separate and independent basis for invalidating a state tax under the Foreign Commerce Clause. In our view, the salient features of these cases put them virtually on a par with *Japan Line* and distinguish them in equal measure from *Container Corporation.* Those features, which we have already discussed in one way or another, may be briefly recapitulated:

First, the airlines here, like the shipping companies in *Japan Line,* are foreign rather than domestic corporations. Indeed, besides being domiciled abroad, many of the airlines are wholly or substantially owned by their national governments. See page 3, *supra.*

Second, the state tax here is imposed, as in *Japan Line,* not on income, but directly on the instrumentalities of foreign commerce. In *Japan Line,* the Court noted that the cargo containers sought to be taxed were associated with the ships that carried them both in our bilateral and in our multilateral agreements (441 U.S. at 436 n.1, 446 n.10, 452-453). Here, similarly, aviation fuel taken on board for use in international traffic is associated with the aircraft that carries it both in the

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Inc., 285 U.S. at 150-151. In any event, the cases were decided long before this Court in *Japan Line* set forth the constitutional analysis to be employed when a state seeks to tax the instrumentalities of foreign commerce.

Chicago Convention and the ICAO Resolutions (see pages 10-13, *supra*) and in our bilateral aviation compacts (see pages 13-17, *supra*). These agreements evidence an international understanding that aviation fuel, no less than the shipping containers at issue in *Japan Line,* is an "instrument[ ] of international traffic" (441 U.S. at 446 n.10, 453).

Third, the state tax here, like the tax in *Japan Line,* "creates an asymmetry in the international tax structure" (441 U.S. at 450) which, unlike the tax in *Container Corporation,* operates *automatically* to foreign nations' disadvantage (see 463 U.S. at 194-195). The uniform practice of nations, evidenced by the Chicago Convention, the ICAO Resolutions, and other countries' implementation of those Resolutions, calls for the instrumentalities of international air traffic to be exempt from all taxes and duties (other than user fees) imposed *either* by national governments *or* by their political subdivisions. Indeed, this policy of reciprocal tax exemptions for the instrumentalities of airborne and maritime trade is the very same "custom of nations" upon which the Court in *Japan Line* relied (441 U.S. at 447 & n.11, 453 & n.18) in invalidating the tax there involved.

Fourth, there exists here, as in *Japan Line,* an "express federal policy" (*Container Corporation,* 463 U.S. at 190), evidenced by multilateral agreements, bilateral agreements, the federal statutory scheme, and consistent regulatory practice, favoring reciprocal tax exemptions for aviation fuel and supplies used in foreign commerce. Our bilateral aviation compacts do not expressly preempt, any more than the Container Convention in *Japan Line* expressly preempted, state taxes on aviation fuel. However, those agreements do "reflect[ ] a national policy to remove impediments to the use of [aircraft] as instruments of international traffic." *Japan Line,* 441 U.S. at 453 (original quotation marks omitted).

Fifth, it is possible here, as it was possible in *Japan Line,* for the state to avoid any burden whatsoever on foreign commerce by adhering to "a single internationally accepted bright-line standard" (*Container Corporation,* 463 U.S. at 193), namely, "do not tax, to any extent whatsoever, [fuel and supplies used by aircraft] 'that are owned, based, and registered abroad and that are used exclusively in international commerce.' " *Id.* at 189-190 (quoting *Japan Line,* 441 U.S. at 444). Here, as in *Japan Line,* "[t]o require that the State adhere to this rule [is] by no means unfair, because the rule [does] no more than reflect consistent international practice and express federal policy" (*Container Corporation,* 463 U.S. at 190). The difficulties that might attend state efforts absolutely to avoid burdening foreign commerce where income taxes are concerned simply do not arise in these cases.

Finally, the tax involved here, like the tax involved in *Japan Line,* clearly "implicate[s] foreign affairs" (*Container Corporation,* 463 U.S. at 194). The State Department has received diplomatic notes from 25 foreign nations protesting Florida's tax in the strongest terms. These notes reflect concern, not only about the instant tax, but about the possibility that "other States [will] follow[ ] the taxing State's example" (*Japan Line,* 441 U.S. at 450-451). See App., *infra,* 3a, 6a, 21a, 42a, 52a. Foreign nations' concerns in this respect have proven justified, since Florida's example has already been followed by Illinois[30] and Massachusetts,[31] and a bill

[30] See Ill. Admin. Reg. § 130.2080(c) (1984) (repealing exemption from sales tax on purchases of aviation fuel previously granted to companies whose stock was "owned exclusively or in part by foreign governments"). A lawsuit challenging this action was recently filed in Illinois trial court by ten foreign airlines. *Air Canada, et al.* v. *Department of Revenue of the State of Illinois,* No. 85CH-6973 (Cook County Cir. Ct. July 12, 1985).

[31] See Mass. Act of July 1, 1985, ch. 145, §§ 7, 9 (enacting new 5¢-per-gallon excise tax on aviation fuel and affording no exemp-

that would accomplish the same result has been introduced in California.[32] The diplomatic notes stress that a proliferation of aviation fuel taxes would prevent this country from offering "true reciprocity" to our trading partners (App., *infra*, 23a), provoking the threat of foreign retaliation that would jeopardize the reciprocal exemption policy.[33]

3. For these reasons, we believe that the Court should note probable jurisdiction in the instant three appeals. The cases involve airlines from 14 different countries, whose bilateral agreements with the United States differ in subtle ways. Although the outcome in our view should generally be dictated by overriding federal policy and established international practice rather than by the idiosyncratic provisions of particular compacts, we think the Court would benefit from having all the relevant fact patterns before it. Particularly might this be true in the case of the Canadian airline, appellant in

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tion for fuel purchased by foreign airlines for use in foreign commerce). The Massachusetts law provides that the new tax shall not be construed "to apply to foreign or interstate commerce, except insofar as the same may be permitted under the provisions of the constitution and laws of the United States." *Id.* § 7 (to be codified at Mass. Gen. Laws Ann. ch. 64J, § 10).

[32] Assembly Bill 2341, Cal. Leg., 1985-1986 Reg. Sess. § 5 (as amended May 24, 1985) (repealing fuel tax exemption previously granted to airlines holding common carrier certificates under the laws of the United States "or of any foreign government").

[33] Besides the possibility of imposing taxes, foreign governments have at their disposal numerous other techniques for discriminating against United States airlines. They can levy artificially-inflated "user fees"; impose obstacles to repatriation of foreign earnings; route airlines to less desirable airports; refuse to let carriers use baggage handlers of choice; give local airlines preference in carrying air cargo; restrict United States airlines' local advertising; or impose excessively complicated customs procedures or other delays and inconveniences. See U.S. Civil Aeronautics Board, *FY 1976 Report to Congress* 103-108 (1977).

No. 84-902, which, owing to Canada's failure to accord American carriers reciprocal exemptions from provincial taxes on aviation fuel (see page 13, *supra*), could conceivably be situated differently from the other appellants.

CONCLUSION

Probable jurisdiction should be noted in No. 84-902; in No. 84-922, limited to the first question presented therein; and in No. 84-1041, limited to the first two questions presented therein.[34] For the reasons stated in our companion brief in Nos. 84-921, 84-926 and 84-929, the other questions presented here are insubstantial.

Respectfully submitted.

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SEPTEMBER 1985

[34] The Court may wish to consolidate the cases for oral argument.

APPENDIX

EMBASSY
OF THE
ARGENTINE REPUBLIC

D.E. No. 910

The Embassy of the Argentine Republic presents its compliments to the Department of State and has the honor to refer to the lawsuit *Lineas Aereas Costarricenses, S.A. v. State of Florida*, which it understands is currently pending before the Supreme Court of the United States. The Embassy of the Argentine Republic wishes to request that the United States support the position taken by the Argentine carrier and many other South American airlines in that case by making a formal presentation before the Court.

It is the policy of Argentina to exempt United States airlines from taxes on aviation fuel purchased by them in Argentine territory. As a result, United States airlines pay no fuel taxes to any governmental authority at any level in Argentina. This policy is based on the assumption that the United States will provide reciprocal treatment to Argentine carriers. Recent events in the State of Florida have called that assumption into question.

The Embassy understands that the State of Florida has imposed a 5.7¢ per gallon tax on aviation fuel purchased in that jurisdiction. We also understand that this tax applies to all fuel purchased by international airlines whether or not it is consumed within United States territory. The Embassy of the Argentine Republic is concerned that this tax, if allowed to stand, will place the United States in conflict with provisions of a number of international

agreements and the established international practice of providing exemptions from fuel taxes. They may, in turn, undermine the basis of reciprocity that has previously existed between the United States and Argentina.

The Embassy of the Argentine Republic would call the attention of the Department of State to Article 24 of the Chicago Convention and, in particular, to resolutions adopted by the Council of the International Civil Aviation Organization on November 14, 1966. These documents make clear the established international practice that airlines should not be required to pay taxes on items such as fuel. They also make it clear that this policy extends not only to taxes imposed by the Central Government, but also those established by local jurisdictions.

The current Air Transport Services Agreement between the United States and Argentina applies this principle in the United States-Argentina markets. Article F of that agreement requires both parties to provide for exemption from taxes. The Embassy of the Argentine Republic notes that this provision is not limited to taxes imposed at any particular level of government and is clearly intended to cover all taxes and similar governmental charges. On the basis of this provision, Argentina has provided tax exemptions to United States airlines. The Embassy of the Argentine Republic respectfully submits that consistent with this agreement, the Government of the United States should do the same. This would require exemption of Argentine carriers from the Florida tax.

The Embassy of the Argentine Republic also notes that there are strong policy reasons supporting the rule against taxation of airline fuel. Many airlines

presently face serious economic challenges and cannot afford the additional burden that fuel taxes would impose on them. These airlines would be compelled to pass this tax onto their passengers and shippers. This would adversely affect the development of international aviation. Additionally, the Embassy of the Argentine Republic would note that if the Florida tax is found acceptable under United States law, other jurisdictions in the United States are likely to impose similar taxes. Indeed, the Embassy of the Argentine Republic understands that the State of Illinois has already taken such action in reliance upon the recent decision of the Florida Supreme Court upholding this tax. The Embassy of the Aregntine Republic is concerned that the establishment of such taxes would not only increase the expenses that airlines and their customers must bear, but would also pose difficult administrative problems. The Embassy of the Argentine Republic believes this would be inconsistent with the many international agreements calling for the establishment of uniform practices affecting international aviation. In view of all of these factors, if the Florida tax is permitted to be imposed, the Embassy of the Argentine Republic believes that foreign countries would feel compelled to re-examine critically whether the United States is, in fact, providing a satisfactory degree of reciprocity regarding fuel taxes.

The Embassy of the Argentine Republic understands that the validity of this tax is now under review in the Supreme Court of the United States in the *Lineas Aereas Costarricenses, S.A.* lawsuit previously mentioned. The Embassy of the Argentine Republic respectfully requests the United States to support the position of the foreign airlines challenging

this tax through the submission of an *amicus curiae* brief to the United States Supreme Court and to bring to the attention of that Court the implications that this tax has for the established system of international aviation.

The Embassy of the Argentine Republic wishes to advise the Department of State that this note should not be considered confidential and that it may be released to the public.

The Embassy of the Argentine Republic avails itself of this opportunity to express renewed assurances of its highest consideration.

Washington, D.C., December 27, 1984

AMBASSADE DE BELGIQUE

The Belgian Embassy presents its compliments to the State Department and wishes to draw its kind attention to the subject of fuel taxes imposed by States of the United States on international aviation.

Belgium exempts at all levels of its government fuel used in international airline operations by United States carriers. This exemption is based on reciprocity.

Belgium emphasizes the established international consensus favoring reciprocal exemption from taxes on the basis of Article 24 of the Chicago Convention as well as the resolutions of the ICAO Council of November 14, 1966 (ICAO Document 8632-C/968).

It is well known that many airlines are facing at the present time serious economic challenges and can ill afford the extra financial burden these taxes impose. Under these circumstances, similar taxes could be imposed by other governments including the government of Belgium.

Finally, State fuel taxes are incompatible with Article 9 of the bilateral aviation agreement between the United States and Belgium which specifically commits the United States Federal Government to use its "best efforts" to obtain exemption of taxes at all levels including the state and local level.

The Embassy of Belgium welcomes the opportunity to renew to the Department of State the assurances of its highest consideration.

Washington D.C., November 30, 1984.

[EMBASSY OF THE FEDERATIVE REPUBLIC OF BRAZIL]

No. 9

The Embassy of the Federative Republic of Brazil presents its compliments to the Department of State and has the honor to refer to the imposition of fuel taxes on foreign airlines by the State of Florida.

Such legislation, effective April 1, 1983, imposes a 5.7 cents per gallon tax on all aviation fuel purchased in the State of Florida, regardless of whether it is to be consumed in Florida or outside the United States.

This matter is of the greatest concern to the Brazilian Government for the following reasons:

A) a state fuel tax on international airlines appears to be incompatible with the spirit of paragraph VII of the Memorandum of Consultation of June 14, 1984, regulating bilateral civil aviation relations. In it each party agreed to the commitment "to make all possible efforts to ensure that the airlines of each country can operate at the maximum efficiency with a fair and equal opportunity".

B) the imposition of such state fuel tax may be deemed to be contrary to Article 24 of the Convention on International Civil Aviation (Chicago Convention), which provides that fuel on board an aircraft of a Contracting State shall be exempt from customs duty, inspection fees or similar national or local duties and charges. Further resolutions by the ICAO Council also provide for exemption from customs and all duties from fuel taken by foreign airlines.

C) other states in this country appear to be encouraged by the Florida fuel tax and seem to be inclined to impose similar taxes of their own.

D) like many other airlines, Brazilian airlines serving the US-Brazil market are currently facing serious economic challenges for which the Florida fuel tax would represent an additional financial burden.

The Brazilian Embassy is informed that a number of foreign airlines, [including] the Brazilian carrier VARIG S.A., will soon appeal to the United States Supreme Court the decision of the Florida Supreme Court of June 14, 1984, which reversed a lower State Court judgment exempting foreign airlines [from] the aforementioned tax. The Brazilian Embassy would appreciate it if the United States Government would extend formal support to the position of the plaintiffs through an *amicus curiae* brief to the Supreme Court, or any other means deemed appropriate.

The Embassy of the Federative Republic of Brazil avails itself of this opportunity to renew to Department of State the assurances of its highest consideration.

Washington, D.C., January 8, 1985.

EMBAJADA DE COLOMBIA
WASHINGTON

No. 1679/E-375

The Embassy of Colombia presents its compliments to the Department of State and has the honor to refer to the legal action instituted by a group of South American airlines entitled *Lineas Aereas Costarricenses, S.A., et al. v. State of Florida Department of Revenue.* The Colombian airline AVIANCA is one of the plaintiffs in this suit, which is now before the Supreme Court of the United States. This lawsuit challenges the validity of a law of the State of Florida imposing a tax of nearly six cents per gallon upon fuel taken aboard by the foreign airlines at Florida airports for international use.

The Embassy of Colombia wishes to bring to the attention of the Department of State its conviction that it is totally inappropriate for local jurisdictions to impose taxes upon fuel intended for use by international airlines. For many years there has been an established practice among nations of exempting fuel purchased by international airlines from tax. This practice is demonstrated in Article 24 of the Convention on International Civil Aviation and resolutions on this subject adopted by the Council of the International Civil Aviation Organization on November 14, 1966. This policy has played an important role in the healthy growth of international aviation by preventing an inappropriate financial burden on airlines and their customers.

Consistent with this international practice, Colombia does not impose taxes at the national or local level upon fuel intended for international airline use. Therefore, all American airlines in Colombia are

fully exempt from fuel taxes at all levels of government. This exemption is based upon effective reciprocity from the United States, including taxing authorities in state and local governments. The Embassy of Colombia views the imposition by the State of Florida of a tax upon fuel intended for use by Colombian carriers as an infringement upon the reciprocity that had previously been established.

The Embassy of Colombia also wishes to point out that the example of Florida could set a precedent to be followed by other governments. If the United States allows its states to impose taxes upon fuel purchased by international airlines, the airlines of the United States could very soon see the initiation of local or national taxes by other nations. The development of such a pattern would surely be detrimental to the interests of all concerned and harmful to the development of aviation.

The Embassy of Colombia understands that the LACSA lawsuit is now pending before the Supreme Court of the United States and strongly urges the United States to formally support the position of the international airlines by submitting to the Supreme Court a brief as *amicus curiae*. The active involvement of the United States in the Supreme Court proceedings would be viewed by Colombia as an appropriate action by the United States in fulfillment of its commitment to provide reciprocal tax exemption in matters regarding international aviation.

The Embassy of Colombia informs the Department of State that the contents of this note are not classified and can be disclosed.

The Embassy of Colombia avails itself of this opportunity to renew to the Department of State the assurance of its highest consideration.

EMBAJADA DE COSTA RICA
WASHINGTON, D.C. 20008

No. 893

October 24, 1984

Dear Mr. Secretary:

I have the honor to address your Excellency with respect to the matter of the imposition of fuel taxes by the State of Florida on international aviation, as well as similar taxes imposed by other local jurisdictions in the United States.

As your Excellency may know, reciprocal tax exemption treatment has been the practice worldwide to aircraft serving international routes. There is an international consensus expressed in Article 24 of the Chicago Convention as well as in ICAO resolution Document 8632-C/968.

Furthermore, the unilateral imposition of fuel taxes on international aviation on the part of the State of Florida is contrary to and violates the spirit of bilateral aviation agreements which provide for exemptions on the basis of reciprocity from national duties and charges.

In addition, the imposition of such aviation fuel taxes, on the part of state tax authorities, is undesirable as a matter of policy. It is not only detrimental to the overall development of international aviation, but could result in a confusing administrative situation and the possibility of widespread aviation fuel taxes worldwide.

Excellency, as a group of international airlines are presenting this matter to the United States Supreme Court in the very near future, on behalf of my Government I would kindly request your good offices to

obtain the support of the Government of the United States before said Court in favor of the principle of the reciprocal fuel tax exemption treatment which is embodied in the letter and the spirit of international aviation relations.

Accept, Excellency, the assurances of my highest consideration.

/s/ Claudio A. Volio
CLAUDIO A. VOLIO
Ambassador

EMBAJADA DEL ECUADOR
WASHINGTON, D.C.

No. -4-2- 185/84

The Embassy of Ecuador presents its compliments to the Department of State and has the honor to request the Department's attention to the following matter.

The State of Florida has imposed a tax of 5.7 cents per gallon on all aviation fuel sold in the State. This tax, which became effective April 1, 1983, is applicable even if the fuel is consumed outside the state or even outside the United States. The tax is thus imposed on fuel purchased by Empresa Ecuatoriana de Aviación ("Ecuatoriana"), the flag carrier of Ecuador, and other Ecuadorean cargo airlines that operate in the State of Florida.

Numerous South American air carriers, including Ecuatoriana, have filed a lawsuit in the Florida state courts (*Líneas Aéreas Costarricenses, S.A. et al. v. State of Florida Department of Revenue*) to challenge this law as being in violation of the United States Constitution. In 1983 the trial court held that foreign air carriers must be exempted from the tax. This decision was reversed by the Florida Supreme Court in June 1984. The carriers have appealed the case to the United States Supreme Court.

The Embassy of Ecuador wishes to inform the Department of State of the grave concern of the Government of Ecuador concerning the imposition of this tax on international air carriers such as Ecuatoriana. It is inappropriate for local jurisdictions such as the State of Florida to impose taxes on fuel used by international air carriers. Under the established practice of nations such fuel purchases are exempt from

tax. Consistent with this practice Ecuador does not impose taxes at the national or local level on fuel used by international air carriers. The Florida tax is inconsistent with this international standard of reciprocity.

This established practice of nations is also demonstrated by Article 24 of the Convention on International Civil Aviation ("Chicago Convention") and resolutions adopted by the Council of the International Civil Aviation Organization on November 14, 1966 (ICAO Document 8632-C/968). The Council resolved that "when an aircraft registered in one State departs from an international airport of another State either for another customs territory of that latter State or for the territory of any other State, the fuel, lubricants and other consumable technical supplies taken on board for consumption during the flight shall be furnished exempt from all customs and other duties." The term "customs and duties" includes "import, export, excise, sales, consumption and internal duties of all kinds levied upon fuel, lubricants and other consumable technical supplies by any taxing authority within a State." (Sec. 1, paras. 1 and 4).

The Embassy of Ecuador further regards the Florida tax on fuel to be used by Ecuatoriana as being inconsistent with the Air Transport Services Agreement between the Governments of the United States and Ecuador (TIAS 1606), which provides for exemption of fuel from "customs, inspection fees or similar duties or charges." (Art. 3 (c)). Consistent with the Agreement, as indicated above, Ecuador does not impose taxes at the national or local level on fuel used by international air carriers.

The imposition of Florida's tax could set a precedent for similar action by other governments. If that were to happen international air carriers—including those of the United States—would be substantially burdened by taxes imposed by national or local [authorities] of other nations. This would be detrimental to the maintenance and development of international aviation.

The Embassy of Ecuador understands that participation by the United States Government in the litigation before the Supreme Court in support of the position of the international air carriers would be important in protecting their interests. It further understands that the United States has presented *amicus curiae* briefs in similar circumstances. Therefore, the Embassy of Ecuador urges that the Government of the United States file an *amicus curiae* brief with the Supreme Court supporting the position of the international air carriers.

The Embassy of Ecuador avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., December 14, 1984

[EMBASSY OF EL SALVADOR]

1. Following is an informal translation of the text of Diplomatic Note 14139 dated December 3, 1984 from the government of El Salvador. Original is being pouched to department

2. I have the honor of addressing your Excellency with regard to air transport relations between the government of the United States of America and the government of El Salvador.

In particular allow me to call to the attention of Your Excellency a tax ruling regarding a tax on aviation fuel, established by the State of Florida and entered into force the first of April 1983, applying to airlines which do not have their principal offices in Florida, as is the case of the Salvadoran Air Line, Taca International Airlines, S.A.

Allow me to make known to Your Excellency, so that you can bring to the attention of the competent authorities of your government, that said ruling is not in accord with Article 9(2)(C) of the Air Transportation Agreement between the government of El Salvador and the government of the United States of America by virtue of which, on a reciprocal basis, are exempted from taxes "fuel, lubricants and the consumable technical supplies introduced into or supplied in the territory of a party for use in an aircraft of a designated airline of the other party engaged in international air transportation, even when these supplies are to be used on a part of the journey performed over the territory of the party in which they are taken on board." In this case, the principle established in this article, based on reciprocity, is not be-

ing applied by Your Excellency's government, while the North American Airlines enjoy this exemption.

On the other hand, based on Articles 9(5) and 11 (1, 2) of the Referenced Agreement, each party shall try to secure for the designated airlines of the other party, on the basis of reciprocity, an exemption from taxes imposed by state, regional and local authorities, with the objective of allowing a fair and equal opportunity for said airlines, using all appropriate methods within its jurisdiction to eliminate all forms of discrimination which adversely affect the competitive position of the airlines of the other party.

As a consequence of the fact that the action taken by the State of Florida contravenes Article 9(2)(C) and based on Article 9(5) and Article 11 (1, 2) the government of El Salvador urges your illustrious government to take the necessary actions to avoid application to the airline designated by El Salvador of this measure imposed contrary to the principles established in the air transportation agreement.

I take this opportunity to renew to Your Excellency the assurances of my highest and most distinguished consideration.

AMBASSADE DE FRANCE
AUX ETATS-UNIS

Washington, D.C.

30 novembre 1984

L'Ambassade de France présente ses compliments au Département d'Etat et a l'honneur de lui faire savoir ce qui suit:

La taxation sur les carburants des aeronefs instaurée par l'Etat de Florida à la suite d'une décision, en date du 11 avril 1983, préoccupe vivement les Autorités francaises.

1. En effet, cette mesure, susceptible à l'évidence d'être prise et appliquée dans d'autres Etats en termes voisins ou comparables, nous paraît, pour l'essentiel, en opposition avec l'esprit de notre accord bilatéral de services aériens du 27 mars 1946, notamment avec son article 3-C.

De même est-elle en opposition avec l'article 24 (A) de la Convention de Chicago en date du 7 décembre 1944.

Les autorités francaises croient donc devoir relever que le maintien d'une telle mesure risquerait de porter atteinte, du point de vue des responsabilités internationales, à la notion même d'accords bilatéraux de services aériens qui pourraient ainsi être modifiés de manière unilatérale et contrairement aux engagements formels souscrits par le gouvernement des Etats-Unis.

Cette constatation avait dèjà été faite par la note adressée le 5 mars 1984 par l'Ambassade à propos de l'affaire—analogue dans son esprit—de la suppression, dans l'Etat d'Illinois, de l'exonération de la taxe sur les achats effectués dans les aéroports.

2. En outre, cette mesure est contraire à la résolution ad hoc du Conseil de l'Organisation de l'Aviation Civile Internationale du 14 novembre 1966 qui prévoit à la section 1, paragraphes 2 et 4, que:

"lorsqu'un aéronef immatriculé dans un Etat part d'un aéroport international d'un autre Etat, soit à destination d'un autre territoire douanier de celui-ci, soit à destination du territoire d'un autre Etat, le carburant, les lubrifiants et autres produits consommables embarqués pour être consummés en vol doivent être fournis en franchise de tous droits de douane et autres, ou que les droits percus doivent être remboursés, à condition qu'avant de quitter le territoire douanier considéré, l'aéronef ait rempli toutes les formalités douanières et autres formalités de congé prescrites sur ce territoire."

Or, cette résolution, fondée sur la notion de réciprocité, est admise par tous les pays. Sa remise en cause porterait atteinte au climat des échanges internationaux; et elle constituerait une entrave certaine au développement des transports aériens internationaux, leur infligeant des surcoûts d'exploitation qui devraient alors être inévitablement supportés par les passagers.

S'agissant de la France, sa pratique est conforme à la résolution de l'OACI précitée, puisque les aéronefs immatriculés aux Etats-Unis, qui partent d'un aéroport francais à destination de n'importe quel autre Etat, sont exonérés, à raison du carburant et de produits embarqués, de la taxe sur la valeur ajoutée (TVA) par l'article 262-11-6 du code général des impôts, ainsi que de la taxe intérieure sur les produits pétroliers (TIPP) par l'article 192, section VI, du code des douanes.

Dans ces conditions, l'Ambassade de France, d'ordre de son Gouvernement, tient à appeler l'attention des Autorités américaines sur l'importance attachée à une solution rapide et heureuse de ce contentieux. Pour leur part, les Autorités francaises sont convaincues de la nécessité, pour les Autorités américaines, d'appuyer auprès de la Cour Suprême des Etats-Unis, la procédure engagée par un groupe de compagnies aériennes pour obtenir l'annulation de la mesure prise par l'Etat de Floride. Elles leur seraient donc reconnaissantes d'engager toute action adéquate dans ce sens.

Les Autorités francaises n'ont pas d'objections à ce que le contenu de cette note soit rendu public.

L'Ambassade de France saisit cette occasion pour renouveler au Département d'Etat l'assurance de sa très haute considération.

EMBASSY OF THE
FEDERAL REPUBLIC OF GERMANY
WASHINGTON, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to refer to the following:

By law effective April 1983, the State of Florida imposed a tax of 5.7 cents per gallon on all aviation fuel sold in Florida, regardless where the fuel is consumed. A group of airlines challenged the legality of the tax in the courts. On June 1, 1983, the Second Circuit Court in and for Leon County, Florida, decided that foreign carriers serving Florida must be exempted from the tax. On appeal by the State of Florida, however, the Florida Supreme Court, on June 14, 1984, reversed the lower court's judgment and held that the imposition of the tax on foreign airlines is legal. The airlines have appealed this decision to the United States Supreme Court.

For the reasons set forth below, the Embassy of the Federal Republic of Germany would appreciate it if the Department of State would support the position of the airlines by an amicus curiae brief to the United States Supreme Court:

1. Article 24 of the Convention on International Civil Aviation provides that fuel on board an aircraft of a Contracting State shall be exempt from customs duty, inspection fees or similar national or local duties and charges. Furthermore, a resolution adopted by the ICAO council on November 14, 1966 (ICAO-Doc. 8362-C/968-1966) provides exemption from customs and all other duties for foreign aircraft taking on board fuel and other consumable supplies.

2. During the still pending negotiations on a new bilateral air transport agreement both delegations achieved consensus on a new article 9, which, in extension of Article 7 of the bilateral air transport agreement of 1955, would grant reciprocal exemptions from national taxes for all purchases of aviation fuel. Both Contracting Parties would use their best effort to secure exemption of the said taxes imposed by state, regional or local authorities.

3. In the Federal Republic of Germany, foreign airlines are exempt from taxes on the purchase of fuel. Should the tax imposed by the State of Florida be upheld, the reciprocity in relation to the exemption existing in the Federal Republic of Germany would be jeopardized.

4. The State of Illinois, apparently encouraged by the judgment of the Florida Supreme Court, already imposed a similar "Retailers' Occupation Tax". Should the judgment of the Florida Supreme Court be confirmed, numerous States of the Union might follow suit. This would disrupt a longstanding worldwide practice established to prevent discrimination and to facilitate the operation of international air services.

5. State taxes on international aviation would prevent the United States to speak with one voice in an important are of foreign trade. This would impede international trade and may be contradictory to the Import-Export Clause of the Constitution of the United States.

The Embassy of the Federal Republic of Germany avails itself of this opportunity to renew to the De-

partment of State the assurance of its highest consideration.

Washington, 29 November 1984

EMBAJADA DE LA REPUBLICA DE
HONDURAS
WASHINGTON, D.C. 20008

November 7, 1984

No. 118-84 EHW/DE

Excellency:

I have the honor to address Your Excellency with respect to the matter of the aviation fuel taxes that have been imposed on international airlines by the State of Florida.

As Your Excellency may know, the established international consensus favors reciprocal exemption from taxes, which is expressed in Article 24 of the Chicago Convention, as well as in ICAO resolution document 8632-C/968.

The Honduran Civil Aeronautic Code contemplates that foreign airlines may introduce, for their own use, duty free fuel and lubricants providing that the Honduran airlines are treated in a reciprocal manner abroad. Since the Republic of Honduras does not have a federal structure, a true reciprocity on the part of the United States would require exemption from taxes at both federal and state levels.

The imposition of fuel taxes by the State of Florida, as well as similar taxes imposed by other local jurisdictions in the United States, could produce retaliatory measures by other foreign governments. This action would be detrimental to the overall development of international aviation and at the same time create administrative, legal, and economic problems.

At the present time, many airlines are facing financial difficulties and these fuel taxes represent a

serious economic challenge for them, which could provide an extra burden on passengers and shippers who use their services.

Excellency, as it is understood that this case will soon be presented to the United States Supreme Court by a group of international airlines, on behalf of my Government I kindly request your cooperation in obtaining the support of the United States Government before the Supreme Court in favor of the principle of reciprocal fuel tax exemption treatment.

Accept, Excellency, the assurances of my highest consideration.

/s/ Juan Agurcia
JUAN AGURCIA
Ambassador

EMBASSY OF ICELAND
2022 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20008

The Embassy of Iceland presents its compliments to the Department of State and has the honor to request assistance in the following matter.

On several occasions the Embassy of Iceland has had the opportunity to express to you Iceland's concern over the continuing failure of the Illinois Department of Revenue to grant to Icelandair (the designated flag carrier of Iceland, partially owned by the government of Iceland) an exemption from Illinois sales and use taxes. Illinois legislation exempts sales to governmental bodies, and the Department of Revenue Rule 40 had confirmed that exemption. Recently, the Illinois Department of Revenue proposed to eliminate such exemption with respect to those foreign air carriers enjoying its benefit, and Iceland again objected. The Illinois Department of Revenue has now in fact eliminated the Rule 40 exemption and is now assessing its sales and use tax against foreign air carriers, regardless of the level of governmental ownership. The City of Chicago continues to levy its local taxes as well. As we have expressed to you, this local taxation is contrary to the tax treaties between the United States of America and Iceland, and is not in the best interest of foreign commerce between our nations.

We have learned that a recent State of Florida Supreme Court decision upheld that state's fuel tax on international aviation. We understand that the carriers involved have appealed to the United States Supreme Court in the case entitled "*Lineas Aereas Costarricenses, S.A. (LACSA), et al. v. Department*

of Revenue, State of Florida". Although the Republic of Iceland is not directly involved as a litigant, we have noted with great interest that the Illinois Department of Revenue, in support of its successful proposal to eliminate the Rule 40 exemption, relied heavily on this Florida decision. In addition, because Icelandair recently has inaugurated a service into Orlando, Florida, Iceland considers it appropriate to express to you, and to request your assistance in presenting, The Republic of Iceland's support of appellant LACSA and its opposition to the imposition of local taxes on international air traffic.

The history of agreements and treaties between The Republic of Iceland and the United States of America relating to the commerce between our two nations has been characterized by mutual cooperation toward a common goal, a stable economic environment:

(a) The Air Transport Agreement of 1945, based on the International Civil Air Conference held in Chicago, Illinois of 1944, exempted aircraft fuel from import custom duties and use or consumption duties for flights into or over our respective nations.

(b) In 1962, an Agreement was entered into granting relief for double income taxation on the earnings from the operation of ships and aircraft operated under the laws of our respective nations.

(c) In 1975, a Convention was entered into for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital of our citizens and the businesses of our respective nations. Article 10 of the Convention specifically exempted from income taxation the "operation in international traffic of ship or aircraft" regis-

tered in our respective nations. In addition, pursuant to Article 17, Iceland agreed that its national capital tax, which has no counterpart in the United States Federal Tax Codes, would not be levied against ships, aircraft and other assets pertaining to the operation of such ships and aircraft.

(d) Lastly, on November 6, 1984, the United States Treasury Department certified the Iceland's exchange of information program for the new Foreign Sales Corporation provisions of The United States of America Tax Reform Act of 1984. We understand that these provisions may further strengthen the economic ties between our two nations.

The Republic of Iceland is concerned that its ability to function economically under its international tax and trade agreements with the United States of America has been, and may continue to be, threatened by the actions taken by local taxing authorities in the United States of America:

(1) Both The Republic of Iceland and the United States of America intended that the Agreements and Treaties would promote trade and commerce. However, as long as individual States and other local authorities assess taxes on the international commercial operations of Icelandair and other foreign carriers, such operations become more expensive. Indeed, if international air carriers such as Icelandair are forced to seek destinations in the United States of America based in any way upon considerations of local taxation of operational essentials such as aviation fuel, the States imposing such taxes, such as Florida and Illinois, may lose the sizeable financial benefits to local, state and regional commerce which naturally result from such international traffic.

(2) Local taxation of international commerce is inconsistent with and violates the reciprocity intended by our Agreements and Treaties. Local taxation prevents the Government of the United States of America from uniformly conducting its relationships with foreign governments. This lack of continuity undermines those relationships.

The Republic of Iceland hereby formally requests that The United States of America consider filing an *amicus curiae* brief in opposition to the State of Florida taxation of aviation fuel used in international aviation. We understand that such brief must be filed prior to January 10, 1985, which we understand is the current deadline.

The Embassy of Iceland avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.
December 18, 1984.

EMBASSY OF ISRAEL
WASHINGTON, D.C.

The Embassy of Israel presents its compliments to the Department of State and has the honor to request its assistance in the following matter.

In June 1984, the Supreme Court of the State of Florida held in a lawsuit involving Lineas Aereas Costarricenses and eleven other foreign carriers ("LACSA litigation") that the State's 5.7 cents per gallon sales tax on aviation fuel is valid. According to information given to the Embassy of Israel, the decision of the Florida Supreme Court is being appealed to the United States Supreme Court.

The Government of Israel wishes to express its strong concern with respect to the decision of the Florida Supreme Court. In addition, the Government of Israel wishes to express its interest in the outcome of the LACSA litigation in the United States Supreme Court.

El Al Israel Airlines Limited ("El Al") is the flag carrier of the State of Israel and is over 99% owned by the Government of Israel. El Al has been designated in accordance with the terms of the Air Transport Agreement between the U.S.A. and Israel, 13.6.1950, and the Protocol relating to the said Agreement of 16.8.1978, and foreign air carrier permits issued by the United States Civil Aeronautics Board, to conduct international flight operations between Miami and foreign points. El Al has in the past engaged and may in the future engage in operations into and from Miami. While the LACSA litigation directly concerns only aviation fuel taxes imposed by the State of Florida, it also has wider im-

plications for international airlines, such as El Al, that serve the United States.

It is the view of the Government of Israel that taxes such as the Florida aviation fuel tax on foreign carriers are in conflict with the principle that international air carriers should be exempt, [a] principle [that] has, for many years, been well established by international treaties and agreements to which the United States is a party.

The United States and the State of Israel are signatories to the Convention on International Civil Aviation (Chicago Convention). Article 24 of the Chicago Convention provides that fuel and aircraft stores on board an aircraft of a contracting state shall be exempt from customs duty, inspection fees or similar national or local duties and charges in the contracting states.

In addition, the International Civil Aviation Organization ("ICAO"), adopted on November 14, 1966, a Council Resolution, in furtherance of Article 24 of the Chicago Convention, which enunciates ICAO's policies on taxation in the field of international air transport and which provides, in part, that when an aircraft registered in one state departs from an international airport of another state, the fuel and other consumable technical supplies taken on board for consumption during the flight shall be exempt from all customs and other duties. The definition of "customs and other duties" set forth in that Council Resolution includes sales, consumption and internal duties and taxes of all kinds levied upon fuel by any taxing authority within a state. The United States has in general accepted the principles enumerated in the ICAO Council Resolution and does not itself impose any such charges. However, some states in the United States, for example, Florida, do

impose such charges. The Government of Israel considers taxes such as the Florida aviation fuel tax to be inconsistent with the aforementioned Resolution.

Moreover, paragraph (c) of Article IV of the Air Transport Agreement of June 13, 1950, between the United States and Israel provides that fuel and aircraft stores retained on board civil aircraft of the designated airline of one contracting party shall be exempt from customs, inspection fees or similar duties or charges in the territory of the other contracting party. This provision is not confined to national charges. It demonstrates the understanding as [between] our two countries of the need for reciprocal exemption from taxes on civil aviation, which would be seriously undermined by the imposition of local fuel taxes by any state of the United States.

Pursuant to paragraph (g) of Article 10 of the 1978 Protocol to the Air Transport Agreement, each party agrees to use its best efforts to secure for the designated airlines of the other party, on a reciprocal basis, an exemption from taxes, charges and fees imposed by state, regional and local authorities on, among other things, aircraft fuel and stores. The State of Israel has no taxes similar to taxes such as the Florida aviation fuel tax. Thus, American-owned airlines operating to and from Israel are granted full exemption from purchase-taxes similar to those imposed by the State of Florida.

The Government of Israel wishes to affirm its position that exemption from taxation on aviation fuel is granted on a basis of reciprocity and would consider the Florida sales tax a deviation from that principle.

It is, therefore appropriate for the State of Israel to request that the United States support the posi-

tion of the international airlines in the LACSA litigation and that the Department of State undertake to transmit the concerns of the State of Israel to the United States Supreme Court.

Dec. 5, 1984

AMBASCIATA D'ITALIA
WASHINGTON, D. C.

The Italian Embassy presents its compliments to the Department of State and wishes to draw its kind attention on the following matter.

Since April 1, 1983, the State of Florida has been applying a five percent sales tax on jet fuel purchased within the State, even by foreign carriers. It seems that the State of Illinois is also about to impose the same amount of tax on fuel purchases, even though foreign carriers have made juridical appeal against the Florida decision and are awaiting the decision of the Supreme Court of the U.S.

Article 3 of the current Civil Aviation Agreement, [like] those signed with many other European countries and Japan, guarantees on the basis of reciprocity the total exemption from import duties, charges and any other tax applied on fuels.

The Italian Embassy understands that the above agreement has not been ratified by the U.S. Senate and that, consequently, the single States maintain their right to autonomously apply such sales taxes in their territories. However, the Memorandum of Understanding, signed by the U.S. Government with various countries aimed at rectifying the conflict of interests between the Federal Government and the States of the Union, guarantee to the countries which signed the Memorandum the U.S. government's support and the application of the non-discriminatory clause (Most Favorite Nation).

In view of the above, and since Italy does not apply any sales taxes to U.S. aircraft re-fueling in Italy, the Italian Government would appreciate it if the Department of State would use its good offices in

order that the appropriate U.S. authorities will rectify the situation as soon as possible.

The Italian Embassy welcomes the opportunity to renew to the Department of State the expressions of its highest esteem and consideration.

Washington, D.C.
October 2, 1984

EMBASSY OF JAPAN
WASHINGTON

January 11, 1985

The Embassy of Japan presents its compliments to the Department of State and, with regard to the recent development in the state of Florida in imposing a tax of 5.7 cents per gallon on aviation fuel sold and loaded in the state for the purpose of international air transportation from April 1983, wishes under instruction from its home Government, to request the Government of the United States to take appropriate measures so that the fuel for use in international air transportation in the state of Florida will be exempted from tax in view of the following points:

(1) Article 6 of the Civil Air Transportation Agreement between Japan and the United States holds that both parties shall be exempted from sales tax on such goods as fuel and lubricating oils for the use in international air transportation purchased and loaded in the other party's territory on the basis of reciprocity;

(2) In the resolution of the International Civil Aviation Organization (ICAO), it is provided that such a fuel tax as that by the state of Florida should be eliminated on the basis of reciprocity. Therefore, the Government of Japan regards such taxation by the state of Florida as inconsistent with this Resolution;

(3) The Government of Japan believes that in encouraging development of an international exchange of people and commerce, it has become an internationally established practice to exempt [from] tax fuel used for the purpose of international air transport.

The Government of Japan wishes to point out that Florida's sales tax on such fuel impedes the sound development of international transportation.

Moreover, the Embassy wishes to call to the attention of the Department of State a similar appeal made on December 9, 1983, in response to the imposition of a similar kind of sales tax by the state of Illinois, and further to the action of Latin American airlines challenging the right of the state of Florida to impose such a tax through a lawsuit, which is currently under review by the United States Supreme Court.

The Embassy avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

[EMBASSY OF MEXICO]

[*Unofficial Translation*]

The Embassy of Mexico presents its compliments to the Department of State and would like to call its attention to the following matter.

The State of Florida established a tax of 5.7 cents per gallon on all aviation fuel sold in its territory from April 1st. 1983 onwards. For this reason, a group of airlines, including Mexicana and Aeroméxico, brought the case to a State court which ruled that foreign air-freighters operating in the State of Florida should be exempted from the aforementioned fuel-tax. However, the administrative State Government authorities of Florida appealed this decision to the State Supreme Court, which reversed the lower court ruling, endorsing the right to levy taxes on the fuel used by international airlines. Consequently, the airlines affected decided to appeal to the Supreme Court of the United States. The case is known as "Líneas Aéreas de Costa Rica, S.A. (LACSA) et al. vs. Department of Revenue, State of Florida."

This Embassy would like to express the serious concern of the Government of Mexico over this situation, since it is of the opinion that the decision made by the State of Florida is in disagreement with the contents of article 7 of the Agreement in force between the Governments of the United Mexican States and the United States of America on the subject of air-transportation. This measure is also inconsistent with the provisions of the Chicago Convention and the resolutions of the International Civil Aviation Council, specifically that of November 4, 1966 (ICAO document 8632-C/968). Moreover, this Embassy considers that if the legality of the fuel-tax levied by

the State of Florida were to be sanctioned, this would result in problems of multiple taxation.

Because of the aforementioned reasons, the Embassy of Mexico request, through the mediation of the Department of State, the support of the Government of the United States for the case of the airlines in question to be tried by the Supreme Court of Justice, suggesting for this purpose to use an *amicus curiae* procedure. It is the understanding of this Embassy that the deadline for the Department of Justice to act as *amicus curiae* would be January 10, 1985.

The Embassy of Mexico avails itself of this opportunity to convey to the Department of State the assurances of its kind consideration.

Washington, D.C. December 11, 1984.

[EMBASSY OF THE NETHERLANDS]

EA-14184

The Royal Netherlands Embassy presents its compliments to the Department of State and has the honour to request the Department's attention to the following.

The State of Florida imposed, effective April 1, 1983, a tax of 5.7 cents per gallon on all aviation fuel sold within its jurisdiction. Under this legislation, all fuel purchased in Florida is taxable, even if it is consumed outside of that state or, indeed, outside of the United States.

Lineas Aereas Costarricenses, S.A. and other foreign air carriers from the Caribbean and Central and South America filed a lawsuit in the Florida courts challenging the legality of this Florida state tax under the United States Constitution. On June 1, 1983, the court before which the initial hearings on this lawsuit were held issued a decision concluding that foreign carriers serving Florida must be exempted from this tax. The State of Florida appealed this decision to the Florida Supreme Court, which on June 14, 1984 reversed the lower court's determination and held that imposition of the tax on international airlines is proper. The plaintiffs have appealed the decision of the Florida Supreme Court to the United States Supreme Court.

The Royal Netherlands Embassy wishes to inform the Department of State of the grave concern of the Netherlands Government with regard to the aforementioned imposition of an aviation fuel tax by the State of Florida on international aviation. In this context, the Government of the Netherlands would

like to observe that said tax is inconsistent with the Air Transport Agreement between the Government of the United States of America and the Government of the Kingdom of the Netherlands of April 3, 1957, Article 7 (d) of which states that "fuel, lubricating oils, other consumable technical supplies, spare parts, regular equipment, and stores taken on board aircraft of the airlines of one Contracting Party in the territory of the other and used in international services shall be exempt on a basis of reciprocity from customs duties, excise taxes, inspection fees and other similar national duties, taxes and charges, even though such supplies be used or consumed by such aircraft on flights in that territory".

The Netherlands Government is of the opinion, furthermore, that the referred Florida state tax is contrary to the established international standard of reciprocity. More specifically, reference may be made to the Resolution of the Council of the International Civil Aviation Organization of No mber 14, 1966, in particular Section I, paras. 1 and 4 thereof, which stipulate that "when an aircraft registered in one State departs from an international airport of another State either for another customs territory of that latter State of for the territory of any other State, the fuel, lubricants and other consumable technical supplies taken on board for consumption during the flight shall be furnished exempt from all customs and other duties". "The expression 'customs and duties' shall include import, export, excise, sales, consumption and internal duties of all kinds levied upon fuel, lubricants and other consumable technical supplies by any taxing authority within a State".

The Netherlands Government has consistently manifested its opposition to any infringement of the

principle that international aviation should be exempted from taxes or other impositions. The Florida state tax under reference, if maintained, would not only be highly undesirable in itself from this point of view, but would, moreover, constitute a precedent for possible similar action by other foreign governments.

The Netherlands Government has been informed that the aforementioned plaintiffs will soon present their case to the United States Supreme Court. For the reasons set out above, the Netherlands Government urges the Government of the United States to give formal support to the position of the plaintiffs in this litigation by filing an *amicus curiae* brief to that effect with the United States Supreme Court. It is the understanding of the Netherlands Government that the deadline for submission of said brief in this case is presently set at January 10, 1985.

The Royal Netherlands Embassy, whilst thanking the Department of State for its attention to this important matter, avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.
December 3, 1984

ROYAL NORWEGIAN EMBASSY
WASHINGTON, D.C.

The Royal Norwegian Embassy, acting also on behalf of the Royal Danish Embassy and the Swedish Embassy, presents its compliments to the Department of State, and has the honour to draw the attention of the Department to the following matter:

The State of Florida on 1 April 1983 imposed a 5.7 per cent sales tax within the territory of its jurisdiction on jet fuel purchased by foreign airlines for international transport. The legality of this decision has since been challenged by a number of foreign airlines serving the US market, and the matter has been appealed to the United States Supreme Court with a request to review and reverse the decision of the State Government.

Already the action taken by the State of Florida has been referred to as a precedent by other local jurisdictions within the United States, contemplating similar measures with regard to taxation of foreign airlines.

The Governments of Denmark, Norway and Sweden have noted these developments with a growing concern. The three governments would in this context like to underline that American-owned airlines, as well as other foreign owned airlines, operating routes to and from Denmark, Norway and Sweden are in these countries granted full exemption from taxes and duties on similar purchases of fuel for international transport.

Such measures as taken by the State of Florida will not only be detrimental to the overall development of international aviation, but would also jeopardize the international consensus and standards of

reciprocity in this field, as well as the equilibrium of the taxation regime for civil aviation as now applied between our respective countries.

A further reason for the concern of the Scandinavian Governments is the possible effect such an action might have on other countries which might follow suit, with the ensuing apparent risk of seriously damaging the fundamental principles of avoidance of double taxation of air transport companies.

The Governments of Denmark, Norway and Sweden would therefore like to express their strong concern with regard to these measures, and urge the Government of the United States to use its good offices in order that the appropriate authorities will rectify the situation.

The Royal Norwegian Embassy avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., 11 December, 1984.

No. 106/84

EMBAJADA DE PANAMA
WASHINGTON, D.C. 20008

E.P.E.A.U. - 507 D

December 12, 1984

The Embassy of Panama presents its compliments to the Honorable Department of State and has the honor to refer to the aviation fuel taxes that have been imposed on international airlines by the State of Florida through its Senate Bill 8A, which was made effective on April 1, 1983.

The Government of Panama is deeply concerned with this matter, as the proposed taxes fall within Article III, Paragraph C of the Agreement on Air Transport Services Between the United States of America and the Republic of Panama, which was signed at Panama on March 31, 1949, which clearly indicates the following:

> "The fuel, lubricating oils, spare parts, regular equipment and aircraft stores retained on board civil aircraft of the airlines of one contracting party authorized to operate the routes and services described in the annex shall, upon arriving in or leaving the areas with respect to which the other contracting party has jurisdiction, be exempt from customs, inspection fees or similar duties or charges, even though such supplies be used or consumed by such aircrafts on flights in those areas."

On the other hand, the established international consensus favors reciprocal exemption from taxes, which is expressed in Article 24 of the Chicago Convention. Also, aviation fuel taxes such as those im-

posed by the State of Florida create a substantial risk of international multiple taxation, and particularly, retaliatory measures by other nations. At the present time many international airlines are facing severe financial difficulties, and the fuel taxes will represent a serious economic burden for them.

Being that many airlines have appealed this decision to the United States Supreme Court, the Embassy of Panama would appreciate very much if the Honorable Department of State would support the position of these airlines by an "Amicus Curiae" brief to the United States Supreme Court.

The Embassy of Panama avails itself of this opportunity to renew to the Honorable Department of State the assurances of its highest consideration.

SPANISH EMBASSY
WASHINGTON, D.C.

No. 301

The Embassy of Spain presents its compliments to the Department of State and has the honor to refer to the State of Florida Senate Bill 8A, about the introduction of a Tax concerning fuel purchased by airlines.

The Government of Spain considers that the proposed taxes fall within Article 7 of the Air Transport Agreement between the Government of the United States of America and the Government of Spain of August 3rd, 1973. In particular Article 7(d) states that "Fuel, lubricating oils, other consumable technical supplies, spare parts, regular equipment, and stores taken on board aircraft of the airlines of one contracting party in the territory of the other and used in international services shall be exempt on a basis of reciprocity from customs duties, excise taxes, inspection fees and other similar national duties, taxes or charges, even though such supplies be used or consumed by such aircraft on flights in that territory". This paragraph covers the taxes listed in the Notice of Proposed Amendment—which accordingly are not consistent with the Air Transport Agreement.

The Government of Spain may also refer to the Resolution of November 14, 1966 of the Council of the International Civil Aviation Organization. In particular Section 1, paragraphs 1 and 4 state that:

> "When an aircraft registered in one State departs from an international airport of another State either for another customs territory of that latter State or for the territory of any other

State, the fuel, lubricants and other consumable technical supplies taken on board for consumption during the flight shall be furnished exempt from all customs and other duties".

"The expression 'customs and other duties' shall include import, export, excise, sales, consumption and internal duties of all kinds levied upon the fuel, lubricants and other consumable technical supplies by any taxing authority within a State". Consequently, the proposals of the State of Florida are inconsistent with the aforementioned Resolution.

The Government of Spain therefore request that the Department of State urge the State of Florida to reconsider its proposals in the light of the United States obligations and commitments.

The Embassy of Spain avails itself of this opportunity to renew to the Department of State the expression of its highest consideration.

Washington, D.C., November 30th, 1984

[EMBASSY OF SWITZERLAND]

The Embassy of Switzerland presents its compliments to the Department of State and has the honor to refer to the recent amendment of the tax law of the State of New York about franchise taxes on transportation corporations.

This new legislation, amending the tax law, will impose on airlines serving the State of New York a tax on capital stock and gross earnings, thus removing the long-standing exemption from such tax granted to foreign airlines as Swissair. The Swiss authorities are concerned about such taxation of Swissair which would be a considerable departure from the worldwide accepted principle that enterprises should be taxed only by the State in which the management of the enterprise actually is located. It would also be contradictory to the ICAO policies on taxation in the field of international air transport stated in the Resolution on taxation of the income of international air transport enterprises and on taxation of aircraft adopted by the Council of ICAO on November 14, 1966 (ICAO Doc 8632-C/968 Section III). Clause No. 1 of this Resolution provides that Contracting States shall, to the fullest possible extent, grant reciprocally exemptions from taxation on the income, property taxes and capital levies or other similar taxes.

The introduction of the new tax would be likely to cause serious problems for the aviation industry and set off a chain reaction around the world which would but add to the present difficulties of the industry.

Finally, the Swiss authorities wish to draw the attention of U.S. authorities to the fact that the fran-

chise tax of the State of New York could have the effect that different Cantons (States) of Switzerland may take the necessary steps to introduce a similar tax to counter-balance the New York legislation.

In view of the foregoing, the Swiss authorities appreciate the consideration the Department of State will give to this matter. They ask the Department of State to kindly transmit the content of this note to the competent authorities of the State of New York. The Swiss authorities trust that the tax exemption for air carriers will be restored as was done for the shipping companies.

The Embassy of Switzerland avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.,
March 3, 1982

EMBASSY OF SWITZERLAND

The Embassy of Switzerland presents its compliments to the Department of State and has the honor to transmit the following:

The Swiss authorities have been informed of a lawsuit currently pending before the United States Supreme Court which involves the legality under the United States Constitution of a tax imposed by the State of Florida on aviation fuel purchased by foreign airlines. In this context the Embassy of Switzerland would like to refer to its note of December 19, 1983, and make the following statement: The Air Transport Agreement of August 3, 1945, between the United States and Switzerland includes in Article 3 tax exemption clauses for introduced and retained fuel. This regulation was consistent with the practice exercised shortly after World War II. Today it is generally recognized that tax exemption is also granted for uplifted fuel. Accordingly, this established practice was enrolled in the newer bilateral air agreements as concluded by the United States and also by Switzerland.

Furthermore, the Swiss authorities wish to point out that U.S. carriers operating to and from Switzerland have never had, up to now, to pay such taxes and duties. In order to prevent discriminatory practices and to assure equality of treatment of U.S. carriers in Switzerland and of Swiss airlines in the United States, the Swiss authorities consider it necessary that reciprocal tax exemption be granted to Swiss airlines.

The Swiss authorities are concerned about the possibility of creating a precedent by confirming the legality of the Florida Aviation Tax Decision by the United States Supreme Court.

For these reasons the Swiss authorities are opposed to such taxes and would be grateful if the Department of State would submit an amicus curiae brief to the United States Supreme Court in the sense of the foregoing statement.

The Embassy of Switzerland avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.,

November 30, 1984

EMBASSY OF THE REPUBLIC OF TRINIDAD AND TOBAGO

1708 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20036

The Embassy of the Republic of Trinidad and Tobago presents its compliments to the Department of State of the United States of America and has the honor to refer to the Air Transport Services Agreement dated February 11, 1946 between the United States and the United Kingdom, an Agreement dated November 22, 1961 between the United States and the United Kingdom providing for air routes between the West Indies and the United States, and an Exchange of Notes dated September 27, 1962 and October 8, 1962 between the United States and Trinidad and Tobago to continue the application of certain agreements (referenced above) to scheduled services between the United States and the Caribbean area by United States and Trinidad and Tobago airlines. Particular attention is called to Article 3(2), (3) of the first document which concerns the reciprocal exemption of each party's air carriers from the payment of fuel and certain other taxes.

It has come to the attention of the Government of the Republic of Trinidad and Tobago that the State of Florida has enacted an aviation fuel tax which is applicable to fuel purchased by both domestic and international air carriers, including Trinidad and Tobago Airways Corporation ("BWIA"), the flag carrier of Trinidad and Tobago. It is also understood that similar taxes either have been enacted or are being considered for enactment by a number of other states.

The Government of the Republic of Trinidad and Tobago wishes to express its grave concern over the application of such taxes to fuel purchased in the United States by international air carriers such as BWIA. The Government of the Republic of Trinidad and Tobago exempts United States air carriers serving Trinidad and Tobago from aviation fuel taxes and other taxes imposed at all levels of government. This exemption is premised upon reciprocal tax exemption granted by the United States to the flag air carrier of Trinidad and Tobago. Moreover, the exemption is consistent with the well-established international consensus favoring reciprocal exemption from taxes which is expressed, for example, in Article 24 of the Chicago Convention and the resolutions of the ICAO Council on this subject, dated November 14, 1966. The Government of the Republic of Trinidad and Tobago believes that the taxation of international airlines by states within the United States is inconsistent with this international standard of reciprocity as well as the standard of reciprocity which exists between Trinidad and Tobago and the United States.

The Government of the Republic of Trinidad and Tobago believes further that the taxation of BWIA by states within the United States violates the spirit if not the letter of Article 3(2), (3) of the Air Transport Agreement dated February 11, 1946 between the United States and the United Kingdom which governs air transport relations between the United States and Trinidad and Tobago. In addition to the specific exemptions set forth in Article 3(2), (3), a more general policy of reciprocal exemption from taxes of all sorts has been established between the two governments. The tax enacted by the State

of Florida constitutes a serious threat to this established pattern of reciprocal exemption.

The Government of the Republic of Trinidad and Tobago believes that true reciprocity on the part of the United States requires air carrier tax exemptions at both the federal and local levels. The failure of the United States to ensure such complete exemptions may be considered a failure of reciprocity under applicable bilateral agreements, and could moreover constitute a precedent for similar action by other foreign governments.

The Government of the Republic of Trinidad and Tobago understands that the issue of state taxation of aviation fuel will shortly be presented to the United States Supreme Court by a group of international air carriers, including BWIA. The Government of the Republic of Trinidad and Tobago is advised that participation by the United States Government in this litigation in support of the position advanced by the international air carriers will be very important, perhaps essential, in the interest of the air carrier appellants. The Government of the Republic of Trinidad and Tobago understands further that it is not uncommon for the United States Governent to join, as *amicus curiae*, the effort of private litigants in similar situations. The Government of Trinidad and Tobago urges the Department of State of the United States to give formal support to the position of the international air carriers in this litigation through the filing of a brief *amicus curiae* with the court.

The Government of the Republic of Trinidad and Tobago has no objection to the public release of this Note.

The Embassy of the Republic of Trinidad and Tobago avails itself of this opportunity to renew to the Department of State of the United States of America the assurances of its highest consideration.

10th December, 1984

WASHINGTON, D.C.

EMBASSY OF THE UNITED KINGDOM

NOTE NO 190

Her Britannic Majesty's Embassy presents its compliments to the Department of State and has the honour to refer to the sales tax on aviation fuel for use in international air transportation which has been imposed by the state of Florida. This tax was challenged by a group of international airlines in the Leon County Circuit Court which decided, on 1 June 1983, that the tax was inconsistent with the obligations of the United States Government contained in its bilateral air transport agreements, and concluded that foreign carriers were entitled to an exemption from the tax. The decision of the Circuit Court was reversed by the Florida Supreme Court without that court having had an opportunity to consider a letter from the Deputy Assistant Secretary of State for Transportation and Telecommunications expressing concern about the serious foreign relations problems that the tax would cause unless provision was made to exempt foreign airlines from it. The plaintiff airlines are appealing the decision to the United States Supreme Court.

Article 8(5) of the United Kingdom/United States Air Services Agreement provides that each contracting party shall use its best efforts to secure for the designated airlines of the other contracting party on a reciprocal basis an exemption from taxes, charges

and fees imposed by state, regional and local authorities on, inter alia, fuel supplied in the territory of the first contracting party for use in the aircraft of those airlines engaged in international air services. The United States Government will also be aware that fuel purchased in the United Kingdom and used in international transportation by the designated airlines of the United States are not assessed by United Kingdom regional or local authorities for taxation purposes. In view of these considerations, and because the Florida Supreme Court did not have the opportunity to consider the policy of the federal authorities before it reversed the Circuit Court decision, Her Majesty's Government requests the United States Government to present their views to the United States Supreme Court in the form of an amicus curiae brief, the deadline for the filing of which is believed to be 10 January 1984.

The Embassy avails itself of this opportunity to renew the assurance of its highest consideration.

British Embassy
Washington DC

10 December 1984

[EMBASSY OF YUGOSLAVIA]

No. 109

The Federal Secretariat for Foreign Affairs of the Socialist Federal Republic of Yugoslavia presents its compliments to the Embassy of the United States of America and notes with interest and great concern the information received about the intention of the State of Illinois to remove sales tax exemption on fuel and food sold to foreign air carriers on its territory.

In the simplest terms, the Yugoslav authorities object in principle to a proposal stemming from a unilateral action, which could well be in conflict with ICAO Council Recommendation as well as with the letter and the spirit of Article 7, paragraph C of the existing bilateral Air Transport Agreement between our two countries, significantly affecting financial operations of the Yugoslav-designated air carrier which currently enjoys the aforesaid exemption.

Therefore, the Federal Secretariat for Foreign Affairs urges the Department of State to take necessary steps for the mentioned intention to be withdrawn, in conformity with the international comity, and avails itself of this opportunity to renew to the Embassy of the United States of America the assurances of its highest consideration.

Belgrade, January 20, 1984

EMBASSY OF THE UNITED
STATES OF AMERICA

BELGRADE

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Nos. 84-902, 84-922 and 84-1041

In The
Supreme Court of the United States
October Term, 1985

Wardair Canada Inc., Appellant
v.
Florida Department of Revenue

Lineas Aereas Costarricenses, S.A.,
et al., Appellants
v.
Florida Department of Revenue

Air Jamaica Limited, et al., Appellants
v.
Florida Department of Revenue

On Appeal From
The Supreme Court of Florida

Appellee's Reply Brief to Amicus Curiae

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POINTS I AND II

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B. NONE OF THE AIR TRANSPORT INTERNATIONAL AGREEMENTS EXEMPT FOREIGN AIRLINES FROM IMPOSITION OF A STATE EXCISE TAX ON THE PURCHASES OF FUELS IN A STATE OF THE UNITED STATES.

DISCUSSION

These cases do not present a substantial federal question concerning the power of a state to levy an excise tax imposed upon the privilege of engaging in the business of selling tangible personal property which includes

aviation fuel (See 84-921, A.C. 7). The decisions of the Supreme Court of Florida are consistent with prior decisions of this Court in the Guarantee Trust Co. v. United States, 304 U.S. 126 (1938); United States v. Pink, 315 U.S. 203 (1942); Hines v. Davidowitz, 312 U.S. 52 (1941); Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983) and Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

The Amicus contends that the instant decisions of the Florida Supreme Court and thus Florida's excise tax, are inconsistent with federal policy as it relates to the taxation of aviation fuel purchased by foreign airlines, while in the United States, and this Court's decision in Japan Line. Based on those premises, Amicus argues that Florida's tax should be declared

unconstitutional as applied.

In Japan Line, this Court set forth two additional requirements to the "four prong" test referred to in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), reh. den. 430 U.S. 976. The first was whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and second whether the tax prevents the federal government from "speaking with one voice when regulating commercial re-- lations with foreign governments." The decisions of the Florida Supreme Court are consistent with the Japan Line and meets both of the additional tests.

As stated by Amicus (See 84-902, A.C. 30), the "multiple taxation" aspect of Japan Line is not a concern in the instant cases. Appellants did not prove - indeed they have not argued - that Florida's sales tax on aviation fuel

"produces multiple taxation in fact" (Japan Line, 441 U.S. at 452). Additionally Amicus did not think that Florida's sales tax "creates a substantial risk of international multiple taxation" (id. at 451)(See 84-902, A.C. 30). The decisions of the Florida Supreme Court are consistent with these observations.

However, Amicus nevertheless suggests that Florida's excise tax, prevents the United States from speaking with one voice thus it fails to meet the second test in Japan Line, and thus is unconstitutional as applied.

First, it should be pointed out that Amicus' statement that fuel should be likened to the containers involved in Japan Line is incorrect. The containers in Japan Line were in fact instrumentalities used for shipping property into the United States.

The containers would be likened to the aircraft themselves and not to the fuel which is consumed by the aircraft in flying into the United States. Thus, Amicus' statement that the fuel is an instrumentality of commerce is totally incorrect. Furthermore, Amicus is incorrect in stating that Florida imposes a tax on aviation fuel. This is not true. Florida's tax is an excise tax imposed upon the privilege of engaging in the business of selling tangible personal property which includes fuel (See 84-921, A.C. 7). The excise tax is imposed on the vendor or dealer and is a privilege tax not a property tax as suggested by Amicus, and which was before this Court in Japan Line. Florida's excise tax on the privilege of engaging in business is totally dissimilar from the ad valorem property tax imposed on the

property itself, in that case, the containers.

Second, contrary to Amicus' contention, Florida's tax does not create an asymmetry in the international tax structure which operates automatically to foreign nations' disadvantage. Amicus leaves the impression that prior to 1983, Florida granted foreign airlines a proration of the tax which was not granted to domestic airlines in international commerce (See 84-902, A.C. 18). In fact, at that time both foreign and domestic airlines, operating over international routes, and traveling only briefly in Florida's airspace, were granted the proration on a mileage basis. With the abolishing of the proration of the tax on the aviation fuel purchased by, either domestic or foreign airlines, both foreign and domestic airlines continue

to be treated equally by Florida. Today, as in the past, Florida provides equal, symmetrical treatment to foreign and domestic airlines in this taxation of sales of fuel purchased in Florida.

It is therefore incorrect to say that the Florida tax "operates automatically to foreign nations' disadvantage." This is a pure sales tax imposed upon the privilege of engaging in the business of selling tangible personal property which includes aviation fuel, irrespective of its use, whether in domestic or foreign commerce. The incident upon which the tax is imposed occurs prior to any commitment of the aviation fuel to any commerce, foreign or domestic. The tax is clearly neutral in its treatment of foreign airlines. It is therefore consistent with the federal policy of nondiscriminatory treatment of foreign

airlines.

Third, Florida's tax is not contrary to the expressed federal policy nor does it impermissibly implicate foreign affairs. In analyzing this tax and foreign affairs, an examination must be made of the "one voice" doctrine. Florida contends that its tax does not interfere with the authority of the United States to regulate commercial relations with foreign governments.

In the international compacts (See 84-902, A.C. 10-16), the federal policy expressed is a spirit of equality of opportunity and treatment. The ICAO's Resolution (See 84-902, A.C. 11), passed under the Chicago Convention on International Civil Aviation, implements the Convention's purpose: to avoid discrimnation against airlines among contracting states. The Conven-

tion, as Amicus states (See 84-902, A.C. 10) exempts only aviation fuel and supplies which are "on board an aircraft." The Resolution, by extending this practice to include state taxes on sales of fuel and supplies was in furtherance of assuring "equitable treatment for international aviation" (84-902, A.C. 12). The Florida tax is certainly consistent with equality of treatment and it is consistent with federal policy as expressed in the international compacts.

While Amicus states that the international compacts "differ in subtle ways" (84-902, A.C. 34), it can be stated without equivocation that the agreements do not expressly preempt state taxes, such as the Florida tax involved in the instant case. (84-902, A.C. 17 and 32).

Federal policy is enunciated by its expression in the official international compacts. This federal policy expresses a pattern, by these international compacts, which falls short of any prohibition upon state taxation of aviation fuel purchased by foreign airlines. Clearly, in this area, the federal government has spoken with one voice to accomplish equality of treatment.

The Amicus is requesting this Court to ignore these international compacts and the expressed federal policy by asking this Court to amend or rewrite these agreements to include an exemption from state excise taxes.

The federal government's "one voice" has spoken, and it says to treat all airlines equally, in every respect and to make sure there is no discrimination in favor of domestic

airlines against the foreign airlines. The Florida tax does not violate this federal policy. The outcome of this case should indeed be dictated by this federal policy and as enunciated in the particular compacts, which in their "idiosyncratic provisions" have set forth a federal policy which places no restrictions on the state's power to impose a nondiscriminatory tax, such as Florida's, upon the privilege of engaging in the business of selling tangible personal property which includes aviation fuel.

CONCLUSION

Based on the foregoing reasons, the Appellee urges the Court to grant its Motion to Dismiss the appeal or to affirm the decisions of the Supreme Court of Florida. These appeals do not present a substantial federal

question as the decisions of the Supreme Court of Florida are consistent with prior decisions of this Court, and it is manifest that the questions on which the decisions in these cases depends are so insubstantial as not to need further argument.

Respectfully submitted,

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